A

DEFENCE

Of the Late

Lord Ruſſel's Innocency,

By way of

Anſwer or Confutation of a Libellous Pamphlet,

INTITULED,

An ANTIDOTE againſt POYSON;

WITH

Two Letters of the Author of this Book,

Upon the Subject of his

Lordſhip's Tryal.

Together with

An ARGUMENT in the Great CASE

Concerning Elections of Members to Parliament,

Between Sr *Samuel Barnardiſton* Bar. Plaintiff,

AND

Sr *Will. Soames* Sheriff of *Suffolk*, Defend'

In the Court of *Kings-Bench*, in an Action upon the Caſe,

And afterwards by Error ſued in the Exchequer-Chamber.

By Sir *ROBERT ATKYNS*,

Knight of the Honourable Order of the *Bath*,

And late one of the Judges of the Court of *Common-Pleas*.

LONDON:

Printed for *Timothy Goodwin*, at the *Maiden-head* againſt St. *Dunſtan's* Church in *Fleet-ſtreet*. 1689.

TO THE READER.

HAving, about five Years ſince, had Applications made to me by divers Friends and Relations of that Moſt Excellent Perſon, the Late LORD *RUSSEL*, when his Troubles befel him, and while he was upon his Tryal, to give him the beſt Aſſiſtance I could in my Profeſſion, and to Inſtruct him how to manage his Defence: And the like Aſſiſtance being afterwards deſired from me, by many more Perſons of the beſt Quality, who ſoon after fell into the ſame Danger: I living at ſome diſtance from *London*, did venture, by Letters, to ſend the beſt Rules and Directions I could, towards the making of their Juſt Defence, being heartily concern'd with them. The Copies of which Letters of mine, being very lately come to my Hands, with an Intention to have them likewiſe Publiſh'd together, with that Diſcourſe or Argument that concern'd that Honourable Lord, I thought it might be ſome help to ſuch as may poſſibly hereafter fall into

the like Danger and Trouble, being by the ſtrict Rules of Law denied the benefit of Councel in Capital Crimes, as to Matters of Fact and Proofs, at an eaſie Rate to be inſtructed, by the Advice contained in theſe Letters, how to manage their Defence. This prevail'd with me to Publiſh the very Letters themſelves, being meerly upon the ſame Subject with the larger Diſcourſe, upon the Title and Head of High-Treaſon.

Firſt

First LETTER,

CONCERNING

My Lord Ruſſel's TRYAL.

SIR,

I Am not without the Apprehenſions of Danger that may ariſe by adviſing in, or ſo much as diſcourſing of Publick Affairs; yet no fear of Danger ſhall hinder me from performing that Duty we owe to one another, to Counſel thoſe that need our Advice, how to make their juſt Defence when they are called in queſtion for their Lives, eſpecially if they are Perſons that have by their general Carriage and Converſation appeared to be Men of Worth, and Lovers of their King and Country, and of the Religion Eſtabliſhed among us. I will follow the Method you uſe, and anſwer what you ask in the Order I find in your own Letters.

I cannot ſee any diſadvantage or hazard by pleading the general Plea of Not Guilty: *If it fall out upon the Proofs that the Crime is only Miſpriſion of Treaſon, and not the very Crime of Treaſon, the Jury muſt then find the Priſoner not guilty of Treaſon, and cannot upon an Indictment of Treaſon find the party guilty of Miſpriſion, becauſe he is not Indicted for the Offence of Miſpriſion, and Treaſon and Miſpriſion of Treaſon are Offences that the Law hath diſtinguiſhed the one from the other, and the one is not included in the other; and therefore if the Proofs reach no farther then to prove a Miſpriſion, and amount not to Treaſon, the Priſoner may urge it for himſelf, and ſay that the Proofs do not reach to the Crime charged in the Indictment, and if the Truth be ſo, the Court ought ſo to direct the Jury, not to find it.*

☞ *Now being preſent in company with others, where thoſe others do conſult and conſpire to do ſome Treaſonable Act, does not make a man guilty of Treaſon, unleſs by ſome Words and Actions he ſignifie his Conſent to it, and Approbation of it: but his being privy to it, and not diſcovering it, makes him*

guilty

guilty of Miſpriſion of Treaſon, which conſiſts in the concealing it, but it makes him not guilty of Treaſon; and if the ſame Perſon be preſent a ſecond time, or oftner, this neither does not make him guilty of Treaſon, only it raiſes a ſtrong ſuſpicion that he likes it, and conſents to it, and approves of it, or elſe he would have forborn after his having been once amongſt them: But the ſtrongeſt ſuſpicion does not ſufficiently prove a Guilt in Treaſon, nor can it go for any Evidence: And that upon two Accounts.

☞ First, *The Proofs in caſe of Treaſon muſt be plain & clear, and poſitive, and not by Inference, or Argument, or the ſtrongeſt Suſpicion imaginable: Thus ſays Sir* Edward Coke *in many places in his third Inſtitutes in the Chapter of High Treaſon.*

☞ Secondly, *In an Indictment of High Treaſon, there muſt not only be a general Charge of Treaſon, nor is it enough to ſet forth of what ſort or ſpecies the Treaſon is, as killing the King, or levying War againſt him, or Coyning Money, or the like, but the Law requires that in the Indictment there muſt be alſo ſet forth ſome Overt or open Act, as the Statute of the 25th of* Edw. *the* 3d. *calls it, or ſome Inſtance given by the Party or Offender, whereby it may appear he did conſent to it, and conſult it, and approve of it; and if the bare being preſent ſhould be taken and conſtrued to be a ſufficient Overt or open Act, or Inſtance, then there is no difference between Treaſon and Miſpriſion of Treaſon; for the being preſent without conſenting makes no more then Miſpriſion, therefore there muſt be ſomething more then being barely preſent to make a man guilty of Treaſon, eſpecially ſince the Law requires an Overt, or open Act to be proved againſt the Priſoner accuſed. See Sir* Edward Coke's *third Inſtitutes* fol. 12. *upon thoſe words of the Statute,* (per overt fact) *and that there ought to be direct and manifeſt Proofs, and not bare Suſpicions or Preſumptions be they never ſo ſtrong and violent, ſee the ſame* fol. *in the upper part of it upon the word* (Proveablement) *and the Statute of the 5 of* Edw. 6. Chap. 11. *requires that there ſhould be two Witneſſes to prove the Crime, ſo that if there be but one Witneſs, let him be never ſo credible a Perſon, and never ſo poſitive; yet if there be no other Proof, the Party ought to be found Not Guilty, and thoſe two Witneſſes muſt prove the Perſon guilty of the ſame ſort or ſpecies of Treaſon. As for Example, if the Indictment be for that Species of Treaſon of Conſpiring the King's Death. Both Witneſſes muſt prove ſome Fact, or Words tending to that very ſort of Treaſon; but if there be two Witneſſes, and one proves the Priſoner Conſpired the Death of the King, and the other Witneſs proves the Conſpiring to do ſome other ſort of Treaſon, this comes not home to prove the Priſoner guilty upon that Indictment, for the Law will not take away a man's Life in Treaſon upon the Teſtimony and Credit of one Witneſs, it is ſo tender of a man's Life, the Crime, and the Forfeitures are ſo great and heavy.*

☞ *And as there muſt be two Witneſſes, ſo by the Statute made in the 13th year of His now Majeſty,* Chap. *the* 1ſt. (*Intituled for the Safety of His Majeſties Perſon*) *thoſe two Witneſſes muſt not only be Lawful, but alſo Credible Perſons. See that Statute in the* 5th *Paragraph, and the Priſoner muſt be allowed to object againſt the Credit of all, or any of the Wit-*

Witneſſes; and if there be but one Witneſs of clear and good credit and the reſt not credible, then the Teſtimony of thoſe that are not credible muſt go for nothing by the Words and Meaning of this Statute. See the Statute. *Now were I a Jury-Man, I ſhould think no ſuch Witneſs a credible Witneſs, as ſhould appear either by his own Teſtimony, or upon proof made by others againſt him to have been* Particeps Criminis, *for that proves him to be a bad, and conſequently not ſo credible a man; eſpecially if it can appear the Witneſs has trapann'd the Priſoner into the committing of the Crime. Then the Witneſs will appear to be guilty of a far higher Crime then the Priſoner, and therefore ought not to be believed as a credible Witneſs againſt the Priſoner, for he is a credible Witneſs that has the credit of being a good and honeſt Man, which a Trapanner cannot have, and this Trapanning proves withal, that the Trapanner did bear a Spight and Malice againſt the Perſon Trapanned, and intended to do him a miſchief, and deſigned to take away his Life. Shall ſuch a one be a credible Witneſs; and be believed againſt him? God forbid.*

☞ *Then again, It cannot but be believed that ſuch Perſons as have been guilty of the ſame Crime, will out of a Natural Self-love be very forward and willing to ſwear heartily and to the purpoſe, in order to the Convicting of others, that they may by this Service merit their Pardon, and ſave their own Lives. And for this reaſon are not ſo Credible Witneſſes, ſuch as the Statute of the* 13 *of* Car. 2. *does require. Read over the whole Chapters of Sir* Edward Coke *of High Treaſon, and of Petty Treaſon; for in this latter of Petty Treaſon there is much matter that concerns High Treaſon.*

I wiſh with all my Soul, and I humbly and heartily pray to Almighty God, that theſe Gentlemen that have given ſo great proof of their Love to the True Religion, and of the juſt Rights and Liberties of their Country, and of their Zeal againſt Popery, may upon their Tryal appear Innocent, I am ſo ſatisfied of their great worth, that I cannot eaſily believe them guilty of ſo horrid a Crime. I pray God to ſtand by them in the time of their diſtreſs;

I wiſh I might have the liberty fairly to give them the beſt aſſiſtance I could, in that wherein I might be any way capable of doing it. I beſeech Almighty God to heal our Diviſions, and Eſtabliſh us upon the ſure Foundations of Peace and Righteouſneſs. I thank you for the favour you have done me, by imparting ſome Publick Affaires which might perhaps have been unknown to me, or not known till after a long time, for I keep no correſpondence.

When there is an occaſion, pray oblige me by a farther accompt, eſpecially what concerns theſe Gentlemen: And tho' I have written nothing here but what is Innocent and Juſtifiable, yet that I may be the ſurer againſt any diſadvantage or miſconſtruction, pray take the pains to tranſcribe what Notes you think fit out of this large Paper, but ſend me this Paper back again incloſed in an other by the ſame hand that brings it.

☞ *There is nor ought to be no ſuch thing as Conſtructive Treaſon, this defeats the very Scope and Deſign of the Statute of the 25th. of* Edw. 3. *which is to make a plain Declaration, what ſhall be adjudged Treaſon by the Ordinary Courts of Juſtice, the conſpiring any thing againſt the King's Perſon, is moſt juſtly taken to be to conſpire againſt His Life.*

But conſpiring to Levy War, or to Seize the Guards is not conſpiring againſt the King's Life. For theſe are Treaſons of a different Species.

Your Faithful

Friend and Servant

R. A.

The

The Second Letter.

SIR,

I *Thank you for the unexpected Accompt you gave me by your first Letter, but this exact Narrative you have now sent me of the Tryal of that Honourable Excellent Person my Lord* Russel *has exceedingly obliged me. It was a thing I much desired, but I knew not from what hand to gain it, for I was a little impatient to hear what could be prov'd of so foul a nature as High Treason against a Person of whom I had ever entertained a very high esteem; and tho' I had a very small and short acquaintance with him, yet no Man that has known any thing of the Publick Affairs, or of our late Transactions could be a meer Stranger to his great Worth. He had as great a Name for a true and honest English Gentleman, and for good Temper, and Prudence, and Moderation, as ever I knew any Man have, and was generally belov'd by all that love our Religion and Country. I presume your Relation of the Proofs at his Tryal is certainly true in every part, and in the very words, and it is a thing that might be had by many hands, the proceedings being so publick, and I suppose deliberate: Presuming it to be true, this I will affirm, that upon this Evidence, both that against him, and for him, (might I have been permitted to have made his defence for him at his Tryal after the Evidence given) I could easily have satisfied any equal and understanding Judicious Man, that my Lord ought to have been acquitted, and had I been one of the Jury that try'd him, I make no doubt I could clearly have convinced all my Fellows (if they were Honest and Indifferent,) that they ought not to have found him Guilty. The Species or sort of High Treason that the Witnesses inclin'd to prove against him, was a Conspiracy with others to Leavy War against the King.*

The two first Witnesses, viz. Rumsey *and* Sheppard, *tho what they say may raise a strong suspicion upon my Lord, and make it probable that he was guilty, yet neither of them do come home and close to the Person of my Lord* Russel, *as they do (I confess) against the Earl of* Shaftsbury, *Sir* Thomas Armstrong *and* Ferguson.

The first does not affirm, that the Lord Russel *did joyn in the discourse, or agree to any thing in the Consult, but only says, he was present, which extends no farther then to make a Misprision of Treason, and this too not directly and positively as Legal Proof ought to be, to convict a Man of Treason; the later* (Sheppard) *when he applies what he swore to the Person of the Lord* Russel *only sayes,* He believes *the Lord* Russel *was there at that time when the discourse he speaks of was used, which is a very imperfect uncertain proof, and not positive enough; so that neither of these were full Witnesses. As to the Evidence given by the Lord* Howard *against my Lord* Russel, *it is strange to me, (as the Evidence is stated) that any Credit should be given to it, that he should be believed against those Execrati-*

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ons, that (it ſeems) he had ſo ſolemnly, and ſo lately uſed to the contrary of his Evidence: eſpecially when by giving this Evidence, he muſt merit his own Pardon, and ſave his own Life, which extreamly takes off from the credit and weight of his Evidence.

What Mr. West *ſays, in reference to my Lord* Ruſſel, *was but bare opinion and hear-ſay, and is no proof at all in Law; ſo that inſtead of two plain, direct, manifeſt, and poſitive, and two credible Witneſſes as the Law requires in Treaſon, here is not in my opinion ſo much as one poſitive Credible Witneſs. The Lord* Howard *(as your Caſe and Narrative ſtates it) is not credible, though direct and poſitive. None of the other three are poſitive, though more credible. In the Statute of the 25th of* Edward *the Third of Treaſons, the word* (Proveablement) *as Sir* Edward Coke *obſerves upon it, in his Third Inſtitutes,* fol. 12. *imports direct and manifeſt proofs, not preſumptions and conjectures, and (as may be added) not probabilities; and ſo the words* (per overt fact) *do (as he obſerves) ſtrengthen that ſence of the word* (Proveablement) *and the Act of Treaſons made ſince this Kings time requires there ſhould be two credible Witneſſes. Now, tho' the Lord* Howard *was not by the Evidence offer'd againſt him by the Lord* Ruſſel *utterly diſabled from being a Witneſs, yet I will be bold to ſay, it made him no credible Witneſs in this Caſe. That the Lord* Ruſſel *made no uſe of theſe things in his Defence, though a man of Parts, is no wonder to me, the ableſt Man under that Terrour, and upon ſo ſpeedy a proceeding and where it is impoſſible to be ſo compoſed and free from diſtraction, may eaſily paſs by many juſt advantages, which a ſtander by with leſs abilities might quickly have apprehended. I am far from reflecting upon the Court that Try'd him, this matter that I obſerved, reſted principally upon the Jury. And he is found Guilty and Condemn'd, and it may be before this comes to your hand, put to Death too; if it have ſo hapn'd (as poſſible it may) that the Earl of* Bedford, *and his other great Relations have prevail'd with the King for a reſpit of the Execution, I wiſh and heartily beg of Almighty God, that theſe Conſiderations may yet be made uſe of to the King, (with whom it then reſts) as* Tabula poſt Naufragium, *to ſave the Life of this Noble Lord. Much more then this may be ſaid, were there ſuch an opportunity before the King, (and I ſo intend it and no otherwiſe) and if I might be any ways ſerviceable in it, I would come up to* London *bare-foot, rather then neglect ſo good an Office. And I ever thought it a ſeverity in our Law, that a Priſoner for his Life is not allowed the aſſiſtance of a grave and prudent Lawyer, or ſome other friend to make his defence for him, even as to matter of fact, as well as to Law. I know 'tis ſaid, the Court is of Councel for the Priſoner, but for my part, I ſhould never deſire to depend upon that onely. I know what this is by experience. If the Caſe be in any part of it miſtaken, I have loſt all my obſervations, and beg your pardon for all this trouble; it is out of the great Honour and Zeal I have for that good Lord, but the Narrative you give is very ably and well compoſed, and in very good Method, and I think could not have been better done, which inclines me to think it very true alſo. I could be contented the Earl of* Bedford *(to whom I am known) might have the view of this Letter, if it come not too late, and may be thought of any uſe; I heartily thank you for your favour, which obliges me to be,*

July 21. 1683.

Your Faithful Friend and Servant,

R. A.

A DEFENCE

Of the Late

Lord Ruſſel's Innocency,

By way of

Anſwer or Confutation of a Libellous Pamphlet,

INTITULED,

An ANTIDOTE againſt POYSON.

1. THE Pamphlet ſtiles it ſelf *An Antidote againſt Poyſon*, but it is ſo far from deſerving that Title, that it may be truly ſaid, *That the Antidote it ſelf is the rankeſt Poyſon.*

We read in Hiſtory that the Noble Emperour called *Henry* of *Luxenburgh* was poyſoned in the Sacrament, and Pope *Victor* was poyſoned in receiving of the Chalice: Who could have ſuſpected ſuch horrid Villany in the Adminiſtration of ſuch ſacred and ſolemn Rites? who could without Horrour and Amazement contrive the mingling of a deadly Poyſon with the Bread and Water of Life? to make thoſe conſecrated Elements (which ought to be the Savour of Life unto Life) to be the dreadful Meſſengers of ſudden Death? Surely had thoſe outward Signs been changed into the very Body and Bloud of the Lord of Life, (as they that acted in thoſe Execrable Villanies profeſs'd to believe) there muſt needs have been a Miracle wrought in altering likewiſe the Subſtance and malignant Nature of thoſe Poyſons, that they ſhould not have wrought thoſe direful Effects; which yet they did. There appears the like wicked Policy in the Author of this Pamphlet, who under pretence of preſcribing an Antidote againſt Poyſon, under the Vizar and Diſguiſe of preventing Miſchief, does moſt deceitfully infuſe the worſt of Poyſons; and labours to intoxicate a whole Nation. This Author would have the World believe that the Noble Lord in the compoſing of his Speech was wholly govern'd by his *Confeſſor*, and that the Compiler of it was infected with thoſe Doctrines, that the Northern Climate has of late furniſhed us with. The very Language and Spirit of *Coleman*! Sure the Soul of *Coleman* is by Tranſmigration enter'd into this Author; it is eaſie to gueſs at his Religion. He ſuppoſes all that were preſent at my Lord's Tryal muſt needs be ſurpriz'd to find the Truth of the Caſe ſo untruly and unfaithfully ſet down in

my Lord's Speech. But whoever will take the pains to read the Tryals publiſh'd by Authority, (which no man will ſuſpect of Partiality towards the Perſon Tryed) will receive abundant Satisfaction in the Truth of what was ſaid by the Lord *Ruſſel*, and diſcover the ſhameleſs Impudence of this Malicious Author.

The Indictment (as we find it printed at large in the Tryal, *fol.* 29.) charges the Priſoner, *that he intending* to diſturb the Peace of the Kingdom, and *to move War and Rebellion* againſt the King, and to ſubvert the Government, and *to depoſe or put down, and deprive the King* from His Title and Kingly Name of the Imperial Crown of His Kingdom of *England*, and *ſo bring and put the King to Death and Deſtruction.*

2. *Nov.* 34. *Car.* 2. and at other times Maliciouſly and Traiterouſly with divers others did *Conſpire*, Compaſs, Imagine, and Intend,

1. To deprive the King of His Title and Government.
2. And to kill the King, and to ſubvert the Government.
3. And to move Inſurrection and Rebellion againſt the King.

And to fulfil and perfect theſe Treaſons, and Traiterous Compaſſings and Imaginations, The ſaid *William Ruſſel* did meet together with divers other Traytors, and Conſult, Agree, and Conclude,

1. To move and ſtir up Inſurrection and Rebellion. And,
2. To Seize and Deſtroy the King's Guards.

The Operative and Emphatical words of this Indictment, are the *Intending, Conſpiring, and Concluding.*

The things Intended, and Conſpired were,

1. *To move and ſtir up War and Rebellion againſt the King.*
2. *To Depoſe the King.*
3. *To Kill the King.* And in order to the Accompliſhing of theſe horrid Crimes.

The things *Concluded* on were,

1. To move *and ſtir up Inſurrection* and Rebellion.
2. To *ſeize and deſtroy the Guards.* This is the very ſum and true Method of the Indictment, if it be truly printed in the Tryals.

Note, Here is no open Act or Deed charg'd to be done by the Lord *Ruſſel*, unleſs his meeting together with others be meant to be an open Act or Deed; but then again that Act of Meeting terminates meerly in Conſulting, Agreeing, and Concluding. They met only to Conſult, Agree, and Conclude, but they acted nothing in purſuance of that Conſulting, Agreeing, and Concluding, for any thing that appears in the Indictment, ſo that the Meeting properly hath not the nature of an Acting or Action, or of a thing done; but the Effect of the Indictment is, that the Lord *Ruſſel* and others did Conſult, Agree, and Conclude to do ſomething, but the Indictment ſtops there, and goes no further, for it ſets not forth any thing done at all, ſo that here is no *Overt Act* or Deed, and therefore the Indictment is void, for there is no Act charg'd but Meeting, and that was meerly in order to Conſult and Agree, and they did agree upon a thing to be done, but it is not ſaid they did it, or did any thing towards it, I repeat this the oftner that it may be the better underſtood and minded, being very material, read the Indictment.

The Indictment is grounded upon the Statute of 25 *E.* 3. *cap.* 2.

(the

(the old Statute of Treaſons.) So the *Attorney General* declares himſelf, *fol.* 49. of the Tryal.

Now let us ſee how far this Charge in the Indictment will make my Lord guilty of any Treaſon within that Statute.

The Body of that Statute of 25 *E.* 3. of Treaſons is printed together with the Tryal, ſee the Tryal, *fol.* 50. ſo that it need not be repeated here, though there are ſome other Clauſes in that Statute not printed in the Tryal.

The occaſion of making that Statute appears to be the variety of Opinions, that then were, what ſhould be accounted Treaſon, and what not, which was very miſchievous to the Subjects, and gave too great a Liberty to the Judges of the Ordinary Courts.

To Cure this mighty Miſchief, and to prevent that Arbitrary Power of Judges, this excellent Statute makes a *Declaration* what ſhall be adjudged Treaſon by the Ordinary Courts of Juſtice, not but that there might be like Caſes or other Facts amounting to Treaſon, beſides thoſe there Enumerated, but thoſe other Facts or Treaſons muſt not be adjudg'd by thoſe Ordinary ſtanding Courts, (ſuch as the Goal-Delivery of *Newgate*, and the Court of the *King's-Bench* at *Weſtminſter* itſelf are) but in ſuch Caſes thoſe Courts muſt forbear proceeding, and the Caſe muſt be reſerv'd for the Determination of the King and Parliament: ſee that Statute in the printed Statutes at large.

So that the Court of Goal-Delivery at *Newgate* muſt Judge only and proceed upon no other Treaſons but what are there Enumerated and Specified.

Now the Treaſons in that Statute Enumerated and Specified (for the word (Specified) is the very word uſed by that Statute) are theſe.

1. Compaſſing or imagining the Death of the { King. / Queen. / Prince,

2. Violating or Carnally knowing the { Queen. / King's Eldeſt Daughter Unmarried. / Prince's Wife.

3. Levying War againſt the King, (not a Compaſſing or Imagining to levy War) but an Actual levying War. It muſt be a War begun, and ſeveral other ſorts of Treaſons are there Specified, not to our Purpoſe to be recited.

The Statute further requires that the Perſon Indicted be *Proveably* attainted of ſome one of theſe Teaſons by *Overt Deed*, that is ſome open manifeſt Act, or Deed done, which muſt of neceſſity alſo be expreſly ſet down in the Indictment, and fully and clearly proved at the Tryal by two Witneſſes.

See Sir *Edw. Coke's* third Inſtitutes in his Chapter of High-Treaſon, *fol.* 12. in his Expoſition of the words of that Statute, (*Per Overt fait*) and there *fol.* 5. upon the words, (*Fait Compaſſer*) he tells you the Nature of that *Open Deed* that the Statute intends. It muſt be a Deed,

Deed, and not meer Words; it muſt be a Deed tending to the Execution of the Treaſon imagined: That Deed muſt be an *open Deed*; *that is, it muſt be fully* proved and made open and manifeſt at the Tryal by clear proof.

So that if the Indictment fail of ſetting forth *one of thoſe Treaſons* that are there enumerated, it is not a good Indictment upon that Statute.

If it do ſet forth one of thoſe Treaſons, yet if it do not ſet forth ſome *open Deed* done by the Party indicted, that is, ſuch a Deed as does properly and naturally tend to the execution of that ſort of Treaſon ſet forth in that Indictment. In ſuch caſe alſo the Indictment is not good.

If both theſe, *viz.* the Treaſon intended, and a proper ſuitable open deed be well ſet forth in the Indictment (which make a good Indictment) yet if that very ſort of Treaſon intended and that open Deed or Fact ſo ſet forth in the Indictment, be not alſo fully clearly and *manifeſtly proved* upon the Tryal againſt the Priſoner, he ought to be acquitted.

It will not ſuffice either to prove it by one Witneſs, or to prove any other ſort of Treaſon (not charg'd in the Indictment) nor any other overt Deed, other then what is ſo ſet forth in that Indictment, tho' it be by never ſo full a proof, but upon that Indictment the Priſoner ought to be acquitted, if that ſpecial Treaſon, and that ſpecial overt or open Deed ſet forth and expreſſed in that very Indictment be not fully proved.

Now let us examine the Indictment in this Caſe againſt the Lord *Ruſſel*, and the proofs againſt him as they are publiſhed by Authority, and obſerve how they agree with the Statute, and how the Indictment and Proofs agree the one with the other.

It may be admitted that here is in the Indictment againſt the Lord *Ruſſel*, a Treaſon ſufficiently charged and ſet forth, *viz.* one of the Treaſons ſpecified in that Statute of 25 *Edw.* 3. namely, That the Lord *Ruſſel* did compaſs and imagine the death of the King. This is not denied; but it is duly charged in the Indictment. For thoſe other Charges in the Indictment, *viz.* his intending *to depoſe the* King, and his intending *to move or levy War and Rebellion* againſt the King; theſe are inſerted into the Indictment as Aggravations of that horrid Crime of intending to kill the King, or as open acts of the other, but of themſelves alone, they are no diſtinct ſubſtantive Charges; nor are they any of the Treaſons ſpecified in this Act, upon which Act this Indictment is ſolely grounded. For tho' by the Act of 13 of this King that now is Chap. 1. entitled (*An Act for the Safety and Preſervation of the King's Perſon*;) it is made High-Treaſon (during the now King's life only) to compaſs or imagine to Depoſe the King; or to compaſs or imagine to levy War againſt the King: If ſuch compaſſing or imagination be expreſſed by ſpeaking or writing, (altho' without any open Deed) yet the Lord *Ruſſel* was not Indicted upon that Statute, (as the Atturney General himſelf acknowledged openly at the Tryal) but only upon the old Statute of 25 *Edw.* 3. So that thoſe late made Treaſons are not to our purpoſe.

So

So that the only Treaſon charg'd in the Indictment as a ſubſtantial Charge, is, that of *imagining to kill the King*. And ſo the Lord Chief Juſtice agrees in his Direction to the Jury. See the Tryal, *fol.* 61.

But where is that other Requiſite, that other moſt material part of the Indictment, of *the open Deed or Act?* without which the reſt ſerves for nothing. For it is not enough by this Statute to make a man guilty of conſpiring or imagining the death of the King, unleſs the Party indicted have expreſſed that Imagination by ſome *open Deed*; and that muſt be plainly ſet down in the Indictment too, or elſe the Indictment (as was ſaid before) is no good Indictment. And it muſt appear to the Court, upon the Indictment, not only to be an open Deed, but ſuch a Deed as has a natural aptitude and tendency to the Execution of that very Treaſon ſo imagined. And there is no ſuch ſet forth in this Indictment, and therefore the Indictment it ſelf was inſufficient and void.

And that which ſeems to have a colour of an overt Fact, or *open Deed* ſet forth in this Indictment, was not fully and ſufficiently proved neither; and then tho' the Indictment had been ſufficient, yet for want of due proof, the Party indicted ought to have been acquitted.

To theſe two Points or Matters, ſhall the enſuing Diſcourſe confine it ſelf: And if this undertaking be made good, the Antidote will appear to be a rank Poiſon; the Lord *Ruſſel*'s Speech juſtified, and his Innocency and Loyalty cleared, and his Honour vindicated.

The *overt Fait* or open Deed ſet forth in the Indictment (if there be any) are the things ſaid to be conſulted of, agreed and concluded on, *viz.* To *move and ſtir up Inſurrection and Rebellion.* 2. To *ſeize and deſtroy the Guards.* (Peruſe the Indictment carefully.)

Now neither of theſe are *open Deeds* in the nature of them.

The firſt, which is to ſtir up Inſurrection and Rebellion; this is a diſtinct Species of Treaſon it ſelf, it is the ſame with a levying of War (ſpecified in this Statute of 25 *Edw.* 3. which is the only Statute we have to do with in this Caſe of my Lord *Ruſſel*) and if it had been ſet forth in the Indictment as a Deed done, or thing acted, that is, if it had been laid in the Indictment, that the War was actually levied, or the Inſurrection or Rebellion actually raiſed or ſtirred up, (as it is not, for it is only mention'd as a thing agreed and concluded on, and not done) yet it had not been a ſufficient proper *overt Fait*, or *open Act*, to make it a good Indictment; becauſe (as is ſaid before) levying of War is a diſtinct ſpecies from that of compaſſing to kill the King; and therefore cannot be made an *overt Fait* or open Deed, to manifeſt an Imagination of killing the King. For that one ſpecies of Treaſon cannot be a proper open Act to another ſpecies of Treaſon, as will be proved hereafter.

Sir *Edward Coke* in his third Inſtitutes, *fol.* 14. in the third Clauſe or Paragraph of that Folio, tells us, That the Connexion of the words are to be obſerv'd, *viz.* (*thereof be Attainted by overt or open Deed.*) This, ſays Sir *Edward Coke*, relateth to the ſeveral and diſtinct Treaſons before expreſſed; whereof that of imagining to kill the King, and that of levying War againſt the King, are two diſtinct Species of High-Treaſon. And therefore ſays Sir *Edward Coke*, the one of them cannot be an overt Act for another; that is, levying of War cannot be an overt Act, for that ſort of Treaſon in imagining to kill the King; much leſs when the Indictment does not charge it as a War actually levied, but only an agreement or concluſion for levying a War. Such agreement can be no open Deed to manifeſt an intent or imagination of killing the King. This is the main queſtion between us.

The other only colour or pretence to an *Overt Fait*, or *open Deed*, muſt be that of ſeizing or deſtroying the King's Guards: for no other but theſe two are ſet forth in the Indictment, or look any thing like overt or open Acts.

And this latter is nothing like to an *Overt Fait* or open Deed, in the nature of it, for it is not ſaid to be done, but only agreed on, and concluded on to be done. If it had been but alledged in the Indictment, that in purſuance of this agreement or concluſion of the Conſpirators, a View was accordingly taken of thoſe Guards, and reported to the reſt (whereof the Lord *Ruſſel* was one) that it was feaſible; (whereof there is ſome colour of proof againſt ſome of them) this had been more to the purpoſe: but being laid ſo imperfectly as it is, the Indictment itſelf muſt needs be inſufficient, for the reaſons before given.

But, alas! the Noble Lord is gone, and he is gone from whence he would not be re-call'd, a place of infinite Bliſs and Glory, out of a ſpiteful malicious World: It is we, it is the King and Kingdom, it is the whole Proteſtant part of the World that ſuffers the eneſtimable loſs of him. Not to ſpeak of the unſpeakable grief of his dear and diſconſolate Widdow, and other Noble Relations: *Factum infectum fieri nequit.* So that we may ſeem to labour in vain, and it comes too late; but ſomething may be done for the benefit of his hopeful Poſterity, and ſome ſmall ſatisfaction may be made to his Noble Family, by a Writ of Errour for reverſing of this Attainder, and the avoiding of the Record; for the Statute of 29 *Eliz.* cap. 2. extends only to ſuch Attainders for High-Treaſon as then had been before the making of that Statute, and does not hinder a Writ of Errour in this Caſe, if the King will ſign a Petition for it.

But to examine this laſt *Overt Fait* or open Deed a little further:

Viz. To ſeize and deſtroy the King's Guards.

The Guards; what Guards? What, or whom does the Law underſtand

ſtand or allow to be the King's Guards, for the preſervation of his Perſon? Whom ſhall the Court that tried this Noble Lord, whom ſhall the Judges of the Law that were then preſent, and upon their Oaths, whom ſhall they judge or legally underſtand by theſe Guards? They never read of them in all their Law-Books: There is not any Statute-Law that makes the leaſt mention of any Guards. The Law of *England* takes no notice of any ſuch Guards; and therefore the Indictment is uncertain and void.

The King is guarded by the ſpecial Protection of Almighty God, by whom he Reigns, and whoſe Vice-Gerent he is: He has an inviſible Guard, a Guard of glorious Angels.

Non Eget Mauri jaculis nec arcu;
Nec Venenatis gravida ſagittis. (*Crede*) *Pharetra.*

The King is Guarded by the Love of His Subjects.

The next under God *and the Sureſt Guard.*

He is Guarded by the Law and Courts of Juſtice.

The Militia and the Trained-bands are his Legal Guard, and the whole Kingdoms Guard.

The very Judges that Tryed this Noble Lord were the King's Guards, and the Kingdoms Guards, and this Lord *Ruſſel*'s Guard againſt all Erroneous and Imperfect Indictments, from all falſe Evidence and Proof, from all ſtrains of Wit and Oratory miſ-applied and abus'd by Councel.

What other Guards are there? We know of no Law for more, King *Henry* the Seventh of this Kingdom (as Hiſtory tells us) was the firſt that ſet up the Band of Penſioners: Since this the Yeomen of the Guard, ſince them, certain Armed Bands commonly now adays (after the *French* Mode) called the King's Life-Guard, rid about and appearing with naked Swords to the Terrour of the Nation, but where is the Law? where is the Authority for them?

It had been fit for the Court that Tryed this Noble Lord on this Indictment to have ſatisfied themſelves from the King's Councel what was meant by theſe Guards; for the alledging and ſetting forth an *Overt fait*, or *open Deed* in an Indictment of Treaſon muſt be of ſomething that is intelligible by Law, and whereof Judges may take Notice by Law: and herein too the Indictment failes and is imperfect.

But admit the Seizing and Deſtroying of thoſe who are now called the King's Life-Guard, had been the Guard intended within this *Overt fait*, or *open Deed*; yet the Indictment ſhould have ſet forth that *de facto* the

the King had choſen a certain number of men to attend upon and Guard His Perſon, and ſet forth where they did attend, as at *White-Hall*, or the *Mews*, or the *Savoy*, &c. and that theſe were the Guard intended by the Indictment, to be ſeiz'd and deſtroy'd, that by this ſetting forth the Court might have taken notice Judicially what and who were meant; but to ſeize and deſtroy the King's Guards, and not ſhew who, and what is meant, makes the Indictment very inſufficient.

So much as to the *Indictment* itſelf.

In the next place let us look into the *Proofs* as they are at large ſet forth and owned in the printed Tryal, and let us conſider how far thoſe Proofs do make out the Charge of the Indictment, *viz.* the Compaſſing and Imagining the Death of the King, and how far they make out that *Overt fait*, or *open Deed* (ſuch as it is) of ſeizing or deſtroying the King's Guards, in order to the effecting of that Compaſſing and Imagining the Death of the King, and it muſt appear by Proof to be in Truth ſo intended by the Conſpirators, and levell'd to that end, for if it were done, yet if it were done quite to another intent and purpoſe, and not to that of Compaſſing the King's Death, it does not come home to this Indictment.

There are but three Witneſſes that can be thought to bring the matter home, and to fix any thing upon the Lord *Ruſſel*, Col. *Romſey*, Mr. *Sheppard*, and the Lord *Howard*.

It is true, two of the three, that is Col. *Romſey*, and the Lord *Howard* poſitively prove a Trayterous Deſign, or a Diſcourſe at leaſt by ſome of the Company of making an Inſurrection or Rebellion, or (to ſpeak it in the Language and Phraſe of this Statute of 25 *E.* 3.) of levying a War againſt the King, (for all theſe ſignifie one and the ſame thing) and they prove the Lord *Ruſſel* was ſometimes preſent at thoſe Meetings; but is that enough? Admit he were preſent and heard the Debate of it; (which yet is not fully and directly prov'd) yet if he did not joyn in the Debate and Expreſs, and ſome way ſignifie his Approbation of it, and conſent to it, it makes him not at all Criminous. It is true, his after concealing of it might have made him guilty of Miſpriſion of Treaſon, but that is a Crime of another nature, and is another diſtinct Genus of Crimes, of which he was not Indicted.

Col. *Romſey* as to the *Overt fait* (as they would make it) ſays *there was ſome Diſcourſe about ſeeing what Poſture the Guards were in*, and being asked by one of the Jury, by whom the Diſcourſe was, he anſwers, *By all the Company that was there*, (whereof as he ſaid before the Lord *Ruſſel* was one) So that my Lorld *Ruſſel* may (I agree) be underſtood to be one that diſcours'd about ſeeing what poſture the Guards were in. Nay the Colonel ſays *all the Company did debate it*, and he ſays further, *the Lord* Ruſſel *was there when ſome of the Company undertook to take the View of thoſe Guards*, and being asked by the *Attorney General*

General to what purpoſe the View was to be, the Colonel anſwers, *It was to ſurpriſe our Guards, if the Riſing had gone on.*

The Chief Juſtice obſerving to the Witneſs that he ought not to deliver a doubtful Evidence, and to ſpeak it with Limitations, that made it not ſo poſitive, as by ſaying, (I apprehend ſo and ſo) then the Colonel grows more poſitive, and ſays further, *that a Riſing was intended*; but afterwards he ſays, *there was no debate of the Riſing*. At laſt the Witneſs being asked by Sir *George Jefferies* whether the Priſoner were preſent at the Debate concerning the Meſſage from the Lord *Shaftsbury* to the Company then met, and the Anſwer return'd to it: He flatly ſays *the Priſoner was preſent at that Debate*, (which Debate did indeed concern the Riſing) being ask'd by the ſame Perſon whether my Lord was averſe to it, or agreeing to it. He anſwers like an Eccho, *Agreeing to it.* Nay, then he ſays my Lord *Ruſſel* did ſpeak, and that *about the Riſing of* Taunton, and *that he did diſcourſe of the Riſing*, but what were his words? Being queſtion'd again by the Chief Juſtice whether *my Lord did give any Conſent to the Riſing*, He anſwers ſtill like an Eccho, *My Lord did:* And this laſt Anſwer is the weighty part of his Evidence, if there be any weight at all.

Now mind the defect of the Witneſs's Memory in ſome other moſt material Paſſages. He *thinks* the Lord *Grey* did ſay ſomething to the ſame purpoſe, with the Anſwer deliver'd by *Ferguſon* to the Lord *Shaftesbury*'s Meſſage.

He does *not know* (ſays he) how often he himſelf (the Witneſs) was at Mr. *Sheppard*'s Houſe where this Debate was. He ſays he was there more then once, *or elſe* I heard (ſays he) Mr. *Ferguſon* make a Report of another Meeting to the Lord *Shaftsbury*. And then he ſays *that this was all at that time that he remembred*, and before this he had ſaid no more againſt the Lord *Ruſſel*, but that he was preſent, and after this upon much Interrogating of him, he proceeds to tell a great deal more, indeed all the reſt that has been before obſerv'd to proceed from him. And after all, he ſays he thinks he was not there above a quarter of an Hour. He ſays he was *not certain* whether he did hear ſomething about a *Declaration* there, or whether Mr. *Ferguſon* did report it to my Lord *Shaftesbury*, that they had debated it. And the Witneſs ſpeaking of a View to be taken of the Guards, to ſurprize them: the Lord Chief Juſtice ſeems to be ſurpriz'd at that word: The *Guards!* he never met it in all his Books. What Guards? why you know it is mention'd in the Indictment; but he might yet very well ask what Guards: And the Colonel anſwers, The Guards at the *Savoy* and the *Mewſe*.

The Colonel ſays, *He thinks* the Duke of *Monmouth*, and the Lord *Grey*, and Sir *Thomas Armſtrong* were the perſons that undertook to

view the Guards. And *he thinks* Sir *Thomas Armſtrong* began it, and Mr. *Ferguſon*. And he ſays further Direction was given to take a view of the Guards, *if the Riſing had gone on*, (as it never did) and then he mentions the very day that had been appointed for the Riſing, *viz.* the 19th of *November*; and that the Meſſage from the Lord *Shaftsbury* was, *he thinks*, a matter of a Fortnight before that day, or ſomething more; for *he thinks* it was concluded *Sunday* fortnight after my Lord *Grey* met. The mention of my Lord *Ruſſel*'s conſent to this Riſing, comes in at the laſt, and after many queſtions ask'd him, and not till that very particular queſtion was put to him, and he anſwers in the very ſame words as the queſtion was ask'd. The Chief Juſtice ask'd him in theſe words, Did my Lord give any conſent to the Riſing? The Colonel's Anſwer was. *Yes my Lord he did*. But how did my Lord *Ruſſel* ſignifie that Conſent? what words did he uſe that may clearly expreſs it? For this is the pinching Proof if it had been certain and clear'd by remembring the manner of his Conſenting, or how it did appear. Why was not this put home to the Witneſs? This is the Material part of his Evidence, without which the reſt had not come home to the Priſoner: And why did not the Witneſs deliver this of himſelf, and before his giving this home Evidence he had ſaid, *That was all at that time that he remember'd*: And this was at the ſame time with that of the Meſſage, and of the Diſcourſe about Viewing the Guards. He afterwards *doubts* whether he was any more then once there with that Company, or *whether he heard Mr.* Ferguſon report things to the Lord *Shaftsbury*, which ſhews a wild kind of Memory in a Witneſs, and the Colonel is no Fool, nor Baby; ſo that there is but one time poſitively ſpoken of by this Witneſs. How ſtrangely uncertain is he in the Matter of the Declaration, to which he was Examined? A moſt noted thing, and he cannot tell whether he heard any thing of it there, or whether Mr. *Ferguſon* told him of it. It is to to be ſuſpected too, that what he has deliver'd poſitively at laſt ſo late in his Evidence, and after ſo much Interrogating of him, was but meer hearſay too, and then it would not have been any Evidence. He has not it ſeems a good diſtinguiſhing Head or Memory, as a Witneſs ought to have in caſe of Life, and a Life of ſo high a value as this of that Noble Lord.

And many other Material Paſſages this Witneſs delivers under that Limitation as (*he thinkes*).

The Riſing was intended, but never took effect; and the View was no more then appointed and undertaken; but the Seizing of the Guards, as this Witneſs ſays, was not to be *unleſs the Riſing had gone on*; which it never did. He ſpeaks nothing of any View made of the Guards, or any Report upon it: but he ſwears my Lord *Ruſſel* conſented to the Riſing. That is his ſtabbing Evidence; but by what words, or how he ſignified his conſent, not a word, tho' mighty material.

But

But what is this Conſpiracy for a Riſing? and a Conſpiracy to ſeize the Guards? (in caſe the Riſing had gone on:) What are theſe to the Crime charged in the Indictment againſt the Lord *Ruſſel* for conſpiring the death of the King?

Here is not a word of any ſuch matter, nor of ſeizing the Guards in order to it, no not one word.

And that is the only material part of the Indictment (as ſhall appear more plainly hereafter.)

The ſecond Witneſs, Mr. *Sheppard*, mentions the meeting (at his Houſe) of the Duke of *Monmouth*, and among the reſt, the Lord *Ruſſel*, and they diſcours'd of *ſurprizing the Guards*, and that the Duke, the Lord *Grey*, and Sir *Thomas Armſtrong*, (*as he remembers*) went one Night to view the Guards, and the next Day at his Houſe they ſaid it was very feaſible, if they had ſtrength to do it. And then he ſays there was two Meetings there, and, *as he remembers*, my Lord *Ruſſel* was both times there. Being ask'd by the Attorney-General, beſides the ſeizing of the Guards, if there were any diſcourſe of a Riſing. He anſwers, *He did not remember any further Diſcourſe*; for he was often gone out of the Room. And this is the effect of that he ſays.

If any thing of this comes near my Lord *Ruſſel*, it is thoſe words, firſt giving an account of who they were that were met, and that my Lord *Ruſſel* was one of them, he ſays the Subſtance of *their* Diſcourſe was how to ſurprize the King's Guards. This may be true, if one or two of the Company only diſcourſes it; for it does not neceſſarily affirm that every one did ſpeak in that Diſcourſe. He does not mention one word ſpoken by my Lord *Ruſſel*, nor that he approv'd of, or conſented to any thing. At the worſt, for any thing that he ſays, it can be but Miſpriſion: He can ſay nothing *as to the Intended Riſing*. Now Colonel *Romſey*'s Evidence is altogether of that Riſing, and the Seizing of the Guards, was to have been if the Riſing had gone on; and this was at the ſame time that Mr. *Sheppard* ſpeaks to, and yet Mr. *Sheppard* being ask'd if there was any Diſcourſe of a Riſing, he anſwers, he did not remember any further Diſcourſe.

Nor does Colonel *Romſey certainly remember* any thing of a Declaration read amongſt them, whether he heard it there, or whether by Mr. *Ferguſon*'s Report of it to my Lord *Shaftsbury*, which is one of the principal things that Mr. *Sheppard* ſpeaks to, (beſides that of ſeizing the Guards.) And as to the Declaration, Mr. *Sheppard* ſays, he cannot ſay my Lord *Ruſſel* was there when that Declaration was read.

So they agree in nothing but in the Diſcourſe of ſeizing the Guards, and that my Lord *Ruſſel* was then preſent.

So that as yet the ſum of the Proof by Colonel *Romſey* is that my Lord *Ruſſel* conſented to the Riſing, which is too general, and the ſum of the Proof by Mr. *Sheppard* is that my Lord *Ruſſel* was preſent in Company when the Company diſcours'd of Seizing the Guards, but he knows nothing of the Riſing.

The third Witneſs (the Lord *Howard*) diſcourſes much about a Conſpiracy to riſe, but he ſpeaks moſt (of what he ſays) by Report from the Earl of *Saftesbury*, and from the Duke, ſo it goes for no Evidence againſt my Lord *Ruſſel*, and the Chief Juſtice did the Priſoner that Right, as to declare as much to the Jury; and the Lord *Howard* cleares the Duke from any ſuch horrid Act as the Killing the King, the Duke ſaid he would not ſuffer it; and if the Duke be Innocent in that, it is probable that my Lord *Ruſſel* and the reſt of the Company that met had no diſcourſe about Killing the King, nor any Thought that way, which yet is the great and only Subſtantial Charge of this Indictment, which muſt ſtill be minded and obſerved.

My Lord *Howard* does indeed prove two ſeveral Conſults, one at Mr. *Hambden* the youngers, the other at my Lord *Ruſſel*'s about the middle of *January* laſt, and after, and that my Lord *Ruſſel* was at both, and theſe Conſults were of an Inſurrection, and where to begin it, and of providing Arms, and Money, and of ſending into *Scotland* to ſettle an Underſtanding with the Lord of *Argile*; and being asked what my Lord did ſay, he anſwers thus, *viz. Every one* (ſays he) *knows my Lord* Ruſſel *is a Perſon of great Judgment, and not very laviſh in Diſcourſe.* But did he conſent? was a Queſtion ask'd by Sir *George Jefferies*, the Lord *Howard* anſwered, We did not put it to the Vote, but it went without Contradiction, and *I took it* that all there gave their conſent, that my Lord *Ruſſel* joyn'd in the chuſing a Councel of Six, that he approv'd of his being choſen for one, that he ſaid one word in theſe two Conſults, there is not any Proof by the Lord *Howard*, only he ſays, *He took it that all there Conſented.* Is that enough? Oh ſtrange Evidence!

I will not here take Notice, or Examine how far the Lord *Howard* is a Credible Witneſs in this Caſe, but refer the Reader to the Teſtimony of my Lord of *Angleſey*, Mr. *Howard*, and Dr. *Burnet*: or how far any of the three Witneſſes are to be believ'd, having all three upon their own Teſtimony been *Participes Criminis*, and it is ſuppos'd have their Pardons, or are promis'd Pardons: Not that this is offer'd to diſable them quite from being Witneſſes, but ſurely all things conſider'd it much leſſens their Credit in this Caſe; nor does it make them the more Credible becauſe no other Witneſſes can be had: But then conſider that moſt Excellent Character given of the Priſoner by Perſons of Honour, and of the higheſt Eſteem for Ability and Integrity, and ſuch as contradicts and is inconſiſtent with

the Charge of the Indictment, and whatever is of weight in the Evidence againſt him, and eſpecially if you give any credit to the Lord *Howard* himſelf, who upon his Oath does declare, as in the preſence of God and Man, That he did not believe that either the Duke of *Monmouth*, or my Lord *Ruſſel* had any deſign to Murder the King; which is the only effectual Charge of this Indictment. Theſe things conſidered, it ſeems very ſtrange to me how the Lord *Ruſſel* could be found guilty of a compaſſing and imagining the Death of the King; for ſo is the Verdict.

This anſwers moſt of the Obſervations made by the Author of the *Antidote* upon my Lord *Ruſſel's* Speech, reſtraining the Expreſſion, as he ſays, of his Innocency to the deſign upon the King's Life, and to killing of the King, and of his omitting to mention the general Riſing: which as this Author boldly affirms, was fully proved upon him; and that my Lord's Profeſſions of his Innocency, as to any Plot upon the King's Life, or to kill the King, or his knowing any thing thereof, theſe (ſays the Author) are no plain declarations of his Innocency, as to the Crime charged and proved upon him, of conſpiring and conſulting to raiſe an Inſurrection. Nor was there any need of my Lord's anſwering that, for it was little material.

How uncertain, how diſ-agreeing, how unapplicable to the Charge of the Indictment thoſe Proofs are, has been fully obſerv'd already; and the Author groſly miſtakes in his Judgment, when he takes the conſpiring and conſulting to raiſe an Inſurrection, to be the Crime charged in the Indictment; for (as was obſerv'd before) the Charge of the Indictment is, the *compaſſing and imagining to kill the King*; and that of a Conſpiracy to raiſe an Inſurrection, or to levy War, is none of the Crimes or Treaſons enumerated or ſpecified in the Act of 25 *E.* 3. and therefore could not be the Crime charged in the Indictment, which is grounded only upon that Act of 25 *E.* 3. (as the Attorney-General acknowledges) for it is an actual levying of War, and not a conſpiring only to levy War, or raiſe an Inſurrection, that is the Treaſon ſpecified in that Act of 25 *E.* 3. and therefore the mention of other things are but by way of aggravation for the more ample ſetting forth of the Crime charged, which is of compaſſing the King's death, and that the conſpiring to make an Inſurrection, cannot be an open Deed to prove a compaſſing the King's Death, has been already ſpoken to, and ſhall be yet more fully.

Nor is the Author more miſtaken in his Obſervations upon the matter of Fact, and his unwarranted Concluſions and Inferences raiſed from thence, then he is in his Determinations of matters in Law ariſing from that Fact.

The Death of the King (ſays the Author) *in that Law* of 25

 E. 3.

E. 3. is not reſtrained to killing of his natural Perſon, but extends as well to his civil Death as natural: As to conſpire *to Depoſe* the King, *to Impriſon* him, or *laying any force* or reſtraint upon him; theſe (ſays the Author) are all High-Treaſon, for compaſſing his Death, natural or civil. If ſo, why then we are at never the more certainty for this excellent Law of 25 *E.* 3.

I agree, that Conſpiring to Depoſe the King, to Impriſon him, are Treaſons; but it is not ſo plain that they are Treaſons within this Law of 25 *E.* 3. upon which this Indictment is grounded. It is true they are made Treaſon by the late Act of 13 of the now King, and have by ſeveral temporary Acts (ſuch as this of 13 *Car.* 2. is) been made Treaſon: but this proves that they were not judged by thoſe Parliaments, that paſs'd thoſe temporary Acts, to be Treaſons within the Statute of 25 *E.* 3. For why then were theſe temporary Acts made? What need was there of them? Sir *Edward Coke* 3 *Inſt. fol.* 9. in the laſt Paragraph but one, of that *fol.* ſays, A Conſpiracy to Levy War, is no Treaſon; he means within the Act of 25 *E.* 3. but it has been made Treaſon ſince Sir *Edward Coke*'s time, *viz.* by 13 *Car.* 2. And let it be remembred, that the great end of making this excellent Law of 25 *E.* 3. (as appears by the Preamble) was to avoid uncertainty, and variety of Opinions, and to prevent the Arbitrarineſs of Judges, in the ordinary Courts; and the Act takes care, that doubtful Caſes, ſuch as are not plainly within the enumeration of the Act, are to be reſerv'd for the Judgment of the King and Parliament. And herein conſiſts the excellency of this Law: *Quoad fieri poſſit, quam plurima Legibus ipſis deſineantur: Quam pauciſſima Judicis arbitrio Relinquantur.* And as the Learned Lord *Bacon* in his *Advancement of Learning*, fol. 447. ſays, That is the beſt Law, which gives leaſt liberty to the Judge; He the beſt Judge that takes leaſt liberty to himſelf: *Miſera eſt ſervitus ubi jus eſt Vagum.* And this Law is a declaration of Law, and therefore ought not to be extended to like Caſes in the conſtruction of it: And it is made in the puniſhment of the greateſt Offences, and is as Penal as a Law can be; and therefore ought not to be expounded by Equity, that is, to be extended to like Caſes.

It is true, the Opinion of the Judges hath been, That Conſpiring to Depoſe or Impriſon the King, is a compaſſing or imagining the Death of the King. And if a Man declares *by Overt-act*, that he will Depoſe or Impriſon the King; this, ſays Sir *Edward Coke*, 3 *Inſt. fol.* 6. upon the word (*Mort*) is a ſufficient Overt-act, for the intent of killing the King: Mind him well, he does not ſay that *Conſpiring* to Depoſe or to Impriſon the King, is an Overt-act, to prove the Conſpiring the King's Death; which is the Opinion the Antidoter maintains, and for which he cites all his Caſes afterwards cited. But Sir *E. Coke* ſays, That Conſpiring to Depoſe or Impriſon the King, *being declar'd by Overt-act*, this Overt-act is alſo a ſufficient Overt-act for the intent of killing the King.

It is one thing to Conſpire to Depoſe the King. And

And another thing to declare, that Conſpiring by ſome open act: they differ as much as thinking does from acting. Now in this Caſe of the Lord *Ruſſel*, the Author of this Antidote, and ſome others (as appears by the Printed Tryals) would have us believe that very Conſpiring to Levy War, is an Overt-act to prove the compaſſing and imagining the King's Death: For which there is not the leaſt ground from Sir *Edward Coke*. Firſt they are different Species, as Sir *Edward Coke* obſerves in his third Inſtitutes, *fol.* 14. the third Paragraph; and therefore (ſays he) the one of them cannot be an Overt-act for another. That is, Conſpiring to Levy War, nay the actual Levying of War too, is one Species of Treaſon, cannot be an Overt-act for the compaſſing the Death of the King, which is another Species of Treaſon. But this is that the Antidoter labours; only ſays Sir *Edward Coke*, the *Overt-act* of the one, may be an Overt-act for another ſort or Species of Treaſon.

And I agree it, if the Overt-act in the one ſort of Treaſon, may as fitly, and as properly in its own nature, and as equally be alſo an Overt-act in the other ſort, and had a tendency to the execution of that other ſort; and it alſo does appear by the proofs, to be ſo intended by the Conſpirators: As for example, Actual ſeizing of the King's Guards (not a Conſpiring to ſeize the King's Guards, and ſuch Guards as are not plainly ſet forth in the Indictment what they are) may in its nature be an Overt-act, to make manifeſt the compaſſing of the King's death, and is an Act proper enough, and has in its nature a tendency towards the execution of the Conſpiracy to kill the King; but then it muſt be proved to be ſo intended and deſigned; that is, in order to the killing of the King; but if it appear otherwiſe upon the proof (as here it did) that it was not ſo intended, but deſign'd meerly in order to a Rebellion, and Levying of War (for which alſo it is as apt, and proper in its nature, and has as great a tendency that way). Then it cannot be applied nor made uſe of as an Overt-act, to prove the compaſſing the King's Death (as in this Caſe of my Lord *Ruſſel's* it was). For this, (as Sir *Edward Coke* well ſays, *fol.* 14. the latter part of the third Paragraph of that *fol.*) would be to confound the ſeveral Claſſes or Species of Treaſon; and the Confuſion of Species is abominable in Nature.

And where Sir *Edward Coke* ſeems to comply with the Opinion and Practice of ſome Judges, that the *Overt-act of Depoſing* may be a good *Overt-act of Killing* (which with the diſtinction that I have offered, is juſt enough) yet he has ſome heſitation; for he concludes that Opinion of his with theſe words, *fol.* 6. in his third Inſtit. upon the word (*Mort*) But (ſays he) peruſe adviſedly the Statutes of 13 *Eliz. cap.* 1. And why thoſe Statutes? Becauſe by thoſe Statutes Conſpiring to Depoſe the Queen are made Treaſons; which needed not (as has been obſerv'd already) if they were Treaſon, within that Clauſe of Compaſſing the King's Death, within the

the Statute of 25 *E.* 3. The like may be obſerv'd in many other ſuch temporary Laws, as that of 25 *H.* 8. *cap.* 22. 26 *H.* 8. *c.* 13. 28 *H.* 8. *c.* 7. 1 *E.* 6. *cap.* 12. & 5. & 6. *Edw.* 6. *cap.* 11.

And it is worthy obſervation, tho' by way of a ſhort digreſſion, that in many, if not in every one of theſe temporary Laws of Treaſon, there is an expreſs Clauſe and Proviſion ſtill, that concealment, or keeping ſecret of any High-Treaſon, ſhould be adjudged Miſpriſion of Treaſon: As if there were great need of that Caution, leaſt the Judges might judge concealing of Treaſon, for High-Treaſon.

Now to ſhew the tenderneſs that the Judges heretofore ſhewed in the expounding of this Statute of Treaſons, of 25 *E.* 3. and how cautious they were in extending it beyond the ſtrict ſence and letter of the Statute: Read the Caſe in *Mich.* 19. *Hen.* 6. *fol.* 47. *Caſe* 102. A Man was Indicted in the *King's-Bench* of Petty-Treaſon (which is declared too by the ſame Statute of 25 *E.* 3. *c.* 2.) for killing his Miſtreſs, whom he ſerv'd: And becauſe the words of this Statute of 25 *E.* 3. declares it Petty-Treaſon where the Servant kills the *Maſter*, they were in doubt whether it ought to be extended to the *Miſtreſs* or not: And there the Judges of the *King's-Bench* (before whom the Caſe was) ſent to the Judges of the Court of *Common-Pleas*, then ſitting, and to the Serjeants there, to know their Opinion of the Caſe: And by Advice of all the Judges of both Courts, it was adjudged Petty-Treaſon for the Servant to kill the Miſtreſs, not only within the meaning, but within the very words of that Statute, for *Maſter* and *Miſtreſs* are in effect but one and the ſame word, they differing only in Gender.

Sir *Edward Coke* ſays, 3 *Inſtit. fol.* 20, & 22. The Judges ſhall not judge a *ſimili*, or by equity, by argument, or by inference of any Treaſon, but new, or like Caſes, were to have been referred to the determination of the next Parliament: *Ubi terminatæ ſunt dubitationes Judiciorum:* ſays *Bracton.*

Let us in the next place examine the Authorities in Law, and Book-Caſes, cited by this Author of the Antidote, and ſee how far they make good his Opinion, that meeting and conſulting to make an Inſurrection againſt the King, or raiſe a Rebellion (which is the ſame with Levying War, within the words of 25 *E.* 3.) tho' the Rebellion be not actually raiſed, is High-Treaſon, within this Law of 25 *E.* 3. for ſo he propoſes the Queſtion, *fol.* 5. of his Book, and if he does not confine his Argument to that Statute, he ſays nothing to the Lord *Ruſſel's* Caſe.

To prove that Meeting and Conſulting to make an Inſurrection againſt the King, or raiſe a Rebellion within the Kingdom (tho' the Rebellion is not actually raiſed) is High Treaſon within the Statute

Statute of 25 *Edw.* 3. *cap.* 2. (which put all together, is the Poſition the Antidoter maintains.) He cites the Caſe of *Conſtable*, mentioned in *Calvins* Caſe, Sir *Edward Cokes* 7th *Rep. fol.* 10. *b.* and thence infers, that whatſoever tended to the Depoſing of Queen *Mary*, was adjudged Treaſon for compaſſing her Death.

And this no man denies, and it agrees with the Judgment of Sir *Edward Coke*, in his Chapter of Treaſon, *fol.* 6. upon the word (*Mort*) where he ſays, He that declareth by Overt Act to Depoſe the King, does an Overt Act of Compaſſing and Imagining the Death of the King, and ſo ſays Sir *Mathew Hales* Pleas of the Crown, *fol.* 11. towards the latter end. But what is this to the point in hand, which meerly concerns a Meeting, and Conſulting to make an Inſurrection, or Raiſing a Rebellion, which is the ſame thing with Conſpiring to Levy War? Conſpiring to Depoſe the King, and Conſpiring to Leavy War are different things. As conſpiring to Leavy War, is clearly held to be a diſtinct Treaſon from Conſpiring the death of the King; and therefore the former of theſe (as hath been before obſerved) cannot by Law be an Overt Act of the latter, as appears by the ſaid Treatiſe of the Pleas of the Crown, *fol.* 13. towards the latter end. Nor was Conſpiring to Leavy War without an actual Levying of it, any Treaſon within the Statute of 25 *Edw.* 3. upon which Statute onely the Indictment of the Lord *Ruſſel* is grounded, as is acknowledged by the Atturney General; and therefore to ſupply that defect, the Statute of 13 *Car.* 2. does expreſly make it to be Treaſon, but the Lord *Ruſſel* was not Indicted upon that Statute of 13 *Car.* 2. and for this reaſon he ought to have been Acquitted upon this Indictment, grounded onely upon the Statute of 25 *E.* 3.

And if practiſing with a Foreign Prince to make an Invaſion, (when no Invaſion followed, as the Caſe of Doctor *Story* was) *Dier* 298. be all one with Conſpiring to Levy War, when indeed no War is raiſed. It is out of all diſpute, that ſuch Practiſing and ſuch Conſpiring cannot be Treaſon within the Statute of 25 *E.* 3. tho' it be Treaſon within the Statute of 13 *Car.* 2.

In the Caſe of the Lord *Cobham*, 1 *Jacobi*, there was more in the Caſe then Conſpiring to make an Inſurrection, (which is all that the Author of the *Antidote* takes notice of) there was alſo an actual Rebellion raiſed, as appears by the ſaid little Treatiſe, ſtyled *The Pleas of the Crown, fol.* 13. for the People were there aſſembled to take the King into their power, as that Book puts the Caſe of the Lord *Cobham*.

And ſo it is in the Caſe of the Lord *Grey*, for there they not only Conſpired to make an Inſurrection, but further to ſeize the King, and get him into their power; which is a direct Conſpiring againſt his Perſon, which naturally tends to the deſtruction of his

Perſon, and is the ſame with Conſpiring his Death, as hath been uſually expounded: but 'tis otherwiſe meerly to Conſpire to make an Inſurrection, which can be no more than conſpiring to Levy War. The Caſe of Sir *Henry Vane* and *Plunket*, had many other Ingredients to mount them up to Treaſon, which difference them from my Lord *Ruſſels* Caſe.

As to the point of Miſpriſion of Treaſon, with which the Author of the *Antidote* concludes, I have fully declared my opinion already, in the former part of this Diſcourſe, and I think plainly evinced, that though the Noble Lord might be preſent, while others might between themſelves privately debate matters, and conclude upon them, yet it did not clearly appear by any proofs that this Noble Lord ever gave the leaſt conſent to what was ſo concluded, without which conſent it could not amount to Treaſon, but at the moſt be a Miſpriſion onely. Nor muſt any Mans Life be taken from him, upon preſumptions or probable Arguments, but by plain, direct, and manifeſt down-right Proofs. But a more ſtrong, and indeed a violent preſumption lay quite the other way, that this Noble, Prudent, and Pious Lord, could never be guilty of ſuch a Crime, as to conſpire the Death of King *Charles* the Second; it was extreamly againſt his Intereſt ſo to do, for the Life of that King, ſo long as it continued, by the bleſſing of God was the great ſecurity, both he and all good Proteſtants had againſt the greater danger that might happen by the change ariſing by the Death of that King, of looſing our Religion, and all our Civil and Religious Rights, as the experience we have lately had, hath ſadly taught us. And if any thing were conſulted between this Excellent Lord, and thoſe with whom he met, as is more than probable, it was how to ſecure themſelves againſt thoſe dangers they ſaw ſo near approaching, if the Life of King *Charles* the Second ſhould fail, there was ſo great a cauſe to fear them, conſidering who was like to ſucceed in the Throne.

FINIS.

AN

AN

ARGUMENT

IN THE

GREAT CASE

CONCERNING

Election of Members,

TO

PARLIAMENT:

BETWEEN

Sir *SAMUEL BERNARDISTON*, Bart. Plaintiff;

AND

Sir *WILLIAM SOAMES*, Sheriff of *Suffolk*, Defendant;

IN THE

COURT of KINGS-BENCH,

IN AN

Action upon the Case; And afterwards by Error;

Sued in the *Exchequer-Chamber.*

By Sir *ROBERT ATKYNS*,

Knight of the Honourable Order of the *Bath*; and late one of the Judges of the Court of *Common-Pleas.*

LONDON:

Printed for *Tim. Goodwin*, at the *Maiden-head* against St. *Dunstan's* Church in *Fleetstreet*. MDCLXXXIX.

AN

ARGUMENT

IN THE

GREAT CASE

CONCERNING

Election of Members

TO

PARLIAMENT.

BETWEEN

Sir JAMES BERNARDISTON, Bart. Plaintiff

AND

Sir FREDERICK SCAMES, Sheriff of Suffolk, Defendant

IN THE

COURT of KING'S BENCH.

Adjourned the Cafe, and Arrards by Error
[illegible] in the [illegible] Number.

By Sir ROBERT [illegible]
Knight of the Honourable Order of the Bath; and late one of
the Judges of the Court of Common-Plea.

LONDON

Printed for Tim. Goodwin, at the Maidenhead against Sr. Dunstan's
Church in Fleetstreet. MDCCXXIX.

Tr. 26. Car. 2. In the Court of the *Kings Bench*, Rot. 577.

Sir *Samuel Barnardiſton*, Bar^t. Plaint.
Sir *William Soame*, Defendant, } *In Treſpaſs upon the Caſe.* Middl. An. Dom. 1674.

Court, or Declaration.

THAT whereas the King, 8 *Feb.* 25. of his Reign, by a Writ out of the *Chancery* directed to the then Sheriff of *Suffolk*, Commanded that he ſhould cauſe an Election to be made of another Knight for the ſaid Shire, in the place of Sir *Henry North*, lately dead; and that he ſhould certify the Election under his own Seal, and the Seals of thoſe that were preſent at the Election, into the *Chancery*.

Which Writ, 12 *Feb.* 25 *Car.* 2. was delivered to the Defendant then Sheriff.

And, 24 *Feb.* 25 *Car.* 2. in full County, by the people reſident in that County, the Writ was Read.

And altho' *the Plaintiff was duely Elected to be Knight* for that County, by the greater number of the people then reſident in the ſaid County, every one whereof could ſpend 40 *s. per annum*, within that County.

And altho' the Defendant then Sheriff of the ſaid County *Premiſſa ſatis ſciens*, afterwards the ſame 24 *Feb.* 25 *Car.* 2. return'd the ſaid Writ into the *Chancery*, together with an Indenture between him the ſaid Sheriff, and the aforeſaid Electors of the Plaintiff, of *the aforeſaid Election of the Plaintiff*, made according as the ſaid Writ requires.

Yet the Defendant then Sheriff *Officii ſui debitum minime ponderans ſed machinans & malitioſe intendens ipſum Samuelem in hac parte minus rite prægravare*, and to deprive the Plaintiff of the Truſt and Office of one of the Knights of the Shire to be exercis'd in Parliament: And to cauſe the Plaintiff to expend great ſums of Money againſt the duty of his Office.

Falſly, *Malicioufly* and *Deceitfully* return'd into the *Chancery*, together with the aforeſaid Indenture, another Indenture

annex'd to the ſaid Writ, *purporting* the ſame to be made between him the ſaid Defendant then Sheriff, of the one part, and divers other perſons, containing, That the ſaid other perſons, as the greater part of the ſaid County, did chuſe one Sir *Lionel Talmach*, Bar^t. otherwiſe *Lionel* Lord *Huntingtowre*, as Knight of the Shire, to come to Parliament.

Where in truth the ſaid Lionel *was not choſen* by the greater part.

By reaſon of which *falſe return* of the ſaid other Indenture, the Plaintiff could not be admitted into the Lower-Houſe at the return of the ſaid Writ, and a long time after.

Till the Plaintiff, upon *his Petition to the Commons*, and till after *he had ſpent divers great ſums of Money* about the proving of his Election, and *divers pains and labours* in that behalf *ſuſtain'd*, afterwards Sc. 20. *Febr.* 26 *Car.* 2. *He was* admitted, and his Election was declar'd to be good.

To his *Damage of* 3000 *l.*

Plea. *Not Guilty.*

Verdict. *Pro quer' dam.* 800 l.

Judgement. *Pro quer'* Sir *Samuel Barnardiſton* in the *Kings Bench*, for the 800 *l.* Damages, and for the 98 *l.* Coſts.

The Defendant, Sir *William Soame*, ſued a Writ of *Error* before the Juſtices of the *Common Bench*, and the Barons of the *Exchequer*, in the *Exchequer Chamber*, to Reverſe the ſaid Judgement given by the Judges in the *Kings Bench.*

And Two of the Juſtices of the *Common Bench*, *viz.* Sir *Robert Atkyns*, and Sir *William Ellis*, upon Argument, were of opinion, That the ſaid Judgment was good in Law, and were for affirming that Judgment.

But the other Two Judges of the *Common Bench*, and the Four Barons of the *Exchequer*, holding the ſaid Judgement in the *King's Bench* Erroneous, were for Reverſing the ſaid Judgment.

And the ſaid Judgment ſtill ſtands Revers'd: But needs a Redreſs by Error in Parliament.

Sir

Sir *Samuel Barnardiſton*, Bar^t. Plaint.
Sir *William Soame*, Defendant, } *In an Action upon the Caſe.*

I Shall divide the Record into the ſeveral Parts of it.

I. There is Firſt, The *Occaſion*, or as we commonly call it, the *Inducement* to the Action; that is, Sir *Henry North*, who ſerved in Parliament as Knight of the Shire for *Suffolk*, died: And a New Writ iſſued to Chuſe another in his Place.

II. In the next place, The *Right* that accrued to the Plaintiff Sir *Samuel Barnardiſton*, He was duly Elected Knight of the Shire.

III. The *Injury* done him by the Defendant, with the Aggravations of it, *viz.* Altho' the Defendant well knew the Plaintiff was duly Elected, and tho he did return him, yet contrary to the Duty of his Office, as Sheriff, and intending to oppreſs him, and to deprive him of the Right he had, and on purpoſe to put him to great Expence and Charges,

He did Falſly, Maliciouſly, and Deceitfully Return another Indenture with the former, importing that another Perſon was choſen by the greater part of the County.

IV. The *Damage* ſuſtained by the Plaintiff, after the Writ was returned,

1. He could not for a long time be admitted to ſit to do his Duty, and diſcharge his Truſt.
2. He was put to great Charges to prove his Election.
3. He did ſuſtain great Pains and Labour.

V. The Right done him at laſt, and the Satisfaction and Amends made him,

1. By *the Houſe of Commons*. His Election was declared good, and he was admitted to Sit.
2. By the *Jury*. They have found the Wrong done by the Defendant; and the Damage ſuſtained by the Plaintiff; and they have repaired him with 800 *l.* Damages.
3. By *the Court of Kings Bench*. They have given Judgment for the Plaintiff.

And the Queſtion before us, is, Whether this Judgment be Erroneous ? I hold the Judgment not to be Erroneous. I am for affirming of the Judgment.

1. I conceive the matter ſet forth in the Plaintiffs Declaration, to be Actionable. 2. That the Wrong and Injury complain'd of, is ſuch for which the Law gives him a Remedy. And 3. That he has taken his proper Remedy, by bringing this Action upon the Caſe.

All this being in the Affirmative, the Proof of it lies upon me.

My Ground and Foundation is this,

That where one Perſon does Injury to another, and the Perſon to whom the Wrong is done, ſuſtains Particular Damage, and Loſs by the Injury, there the Law gives a Remedy by Action, to the Party Injur'd.

But here is an Injury done.
And here is a Particular Damage ſuſtain'd.
Therefore an Action lies.

I ſhall firſt Prove the Ground or Foundation, which is the Major Propoſition, That *where a Wrong or Injury is done, and a Particular Damage ſuſtained, there the Law gives a Remedy by Action.*

1. From the Nature and Quality of the Law; which is to do Right to all, and to give Relief and Redreſs to thoſe that receive Wrongs. And ſhould there be any Caſe where a Perſon might receive an Injury and Damage, and yet have no Remedy nor Redreſs, the Law would be defective; which would be a Reproach to the Law and Government.

The Law has appointed ſeveral Courts, and given them ſeveral Powers and Juriſdictions; ſo that in the one or other, every perſon that has ſuffer'd Injury and Damage, may make his Complaint, and have Right done him.

Sir *Edw. Coke* in his *Mag. Chart.* fol. 405. in his *Expoſ.* upon the *Stat.* of *W.* 2. *c.* 14. ſays, It is an Ancient Maxim of the Common Law, *Non recedant querentes a curia Regis ſine Remedio.* Whoever has juſt cauſe to Complain, ſhall have their juſt Remedy. And *Curia Regis non debet deficere in juſtitia Exhibenda.*

Both theſe Rules and Maxims, which have one and the ſame ſenſe, are remembred in that *Stat.* of *Mag. Chart. c.* 24.

In *Pinchons ca.* 9. *Rep. fol.* 88. *b. adjud.* That an Action upon the Caſe, lies againſt Executors for a Debt due by the Teſtator upon a ſimple Contract. And in the Argument of that Caſe it is ſaid, That by that Reſolution, *Juſtice and Right is advanc'd*, and the Creditor paid his juſt Debt; and if the Debt ſhould be diſcharg'd by the Death of the

the Debtor, *It would* (ſay the Judges) *be a great defect in the Law*, that there ſhould be a Right, and *no Remedy for it*; and the Judges urge the Maxim I mentioned but now, *Curia Domini Regis deficere non debet conquerentibus in Juſtitia exhibenda.*

In *Meriel Treſhams ca.* 9. *Kep. fol.* iii. It is urged *as an abſurd thing* in Law, That a Man ſhould have Wrong done him, and yet ſhould be without Remedy: And the Reporter does obſerve, *That the Judges in all Ages* have endeavoured to put the *Rule* of *W.* 2. in execution; *Curia Domini Regis non debet deficere conquerentibus in Juſtitia Exhibenda.*

Nay, the Law has ſo great a Zeal for redreſſing of Wrongs, that as *Sacred as the Maxims and Rules* of the Law are, yet if there were any Rules or Maxims that ſtood in our way to hinder, the Law would break through thoſe Rules and Maxims, *rather than ſuffer an Injury*, to be without Remedy. 4 *Inſt. fol.* 71. *about the Middle. No Wrong or Injury either publick or private can be done, but it ſhall be Reform'd or puniſh'd in one Court or other by due Courſe of Law.* And in the lower end of that folio, *A Failure of Juſtice is abhorr'd in Law.*

Sir *Franc. Bacon* amongſt the Elements of the Law, *fol.* 51. delivers this as a Principle,

Receditur a placitis Juris potius quam injuria & delicta remaneant impunita; which he himſelf expounds in this Senſe, The Law will diſpence with ſome Maxims, rather than Wrongs ſhould be unpuniſh'd.

2. My next Argument to prove this Poſition, *That where an Injury is done, and Damage ſuſtain'd, the Law gives Remedy*, ſhall be taken *from the Nature of an Action*, which is the ordinary Remedy the Law gives, for the repairing of a private Wrong.

Now what the Nature and Definition of an Action is, we learn from the moſt Ancient Authors of the Law, as *Bracton*, and *Fleta*, and the *Mirror* of the Juſtices, as they are Collected by Sir. *E. C.* 2. *Inſt. fol.* 40. and they all agree almoſt in the ſame words:

Actio nihil aliud eſt quam jus proſequendi in judicio, quod alicui debetur & quod naſcitur ex maleficio, vel quod proverit ex delicto vel injuria.

It is nothing elſe but a Means or Remedy for a man to have Right done him, that has ſuffered Wrong and Injury.

It is the Argument commonly uſed, and the Reaſon given to maintain an Action, and in particular an Action upon the Caſe, *viz. That there is an Injury done, and a damage ſuſtain'd.*

Sir *E. C.* 12. *Kep. fol.* 128. *Reſ. p. tot. cur.* If a *Sumner* return one ſummon'd or cited into the *Spiritual Court*, where in truth he was never ſummon'd, and he is pronounc'd Contumax, and thereupon Excommunicate: he ſhall have an Action upon the Caſe, againſt the Sumner; and the Reaſon given, is, becauſe there is *Injuria & Damnum.* 'Tis the ſame Caſe that is *Reported in Rolles's* 1. *Kep. fol.* 63. by the Name of *Powle and Godfrey*; which I ſhall have further occaſion to mention be-

fore I have done: You have the ſame Caſe Reported by Sir *Francis Moor*, fol. 835.

This may ſuffice to prove the Major Propoſition, *That where Wrong and Injury is done to any man, and particular Damage ſuſtain'd by it; there the Law entitles him to an Action.*

For the Minor Propoſition. That in the Caſe before us, there is a Wrong and Injury done to the Plaintiff, and a Particular Damage ſuſtain'd by him: *To make this out*, I ſhall need to do no more, than barely to relate the very Fact, and put it as a Queſtion to any plain man, that has but a common capacity, and no Learning, nor acquired Parts; and to ſtand to his Judgment in the Caſe.

And the Caſe is no more than this;

The Plaintiff had the Honour to be Choſen to that Great Truſt and Employment, of a Knight of the Shire, by his Countreymen, to ſerve in Parliament; by which he was juſtly intituled to ſeveral great Privileges, and to Wages for the time he ſerv'd. And 'tis an Honour and Employment we all know is highly eſteem'd, and generally deſired and ſought after; and he that deſires it, deſires a good Office. The Defendant having the Office of a Sheriff, and being bound by his Office and Oath to do juſtly and truly; *Et præmiſſa ſatis ſciens*; that is, well knowing the Plaintiff had the only Right to be Return'd, and that no other had the leaſt Colour for it; and where there was not the leaſt doubt or difficulty in the Caſe;

Yet falſly, deceitfully, and maliciouſly, to deprive him of his Truſt and Office, on purpoſe to put him to great Charges,

He Return'd another Perſon with him.

And after all, the Queſtion is, Whether he has done him any Wrong or no?

By Occaſion of this, the Plaintiff was hindred from Sitting in the Houſe, and was put to Great Expence, and underwent great Trouble and Labour. And the Queſtion is, Whether the Plaintiff has been at any particular Damage?

Shall I have my Action for a half-penny Treſpaſs, *pedibus ambulando?* Does the Law give me an Action of Aſſault and Battery, if a man does but lift up his hand to ſtrike me? Or for a few ill words, that will break no Bones? And ſhall I recover Damage for theſe petty things, and ſhall no Action lye for ſo notorious an Injury as is done in this Caſe?

But our greateſt Work is to anſwer the many Objections that have been made againſt this Action; which yet I will be bold to ſay, have much more of Wit, than of Weight in them.

And the Difficulty rather lies in the great Power and Intereſt of the Parties to the Action, and of thoſe that concern themſelves in the Example and Conſequence of it, upon a Politick Account, than from any Uncertainty of the Law: that is, there is a deſign to model the Parliament to the Humour of the Court.

Sir

Sir *Edw. Coke, in his Preface to the* 10th Rep. fol. 6. in the beginning of the fol. affirms, That he never ſaw any Caſe of great value proceed quietly without many Exceptions in Arreſt of Judgment.

Object. I. *This is a matter that concerns* the Government, and is of a publick nature: the employment of a Parliament Man, conſiſting in *Negotiis Regem, ſtatum, & defenſionem Regni & Eccleſiæ concernentibus:* And therefore the puniſhment of an offence committed, in reference to this, ſhould be by a publick Proſecution, and not to be appropriated to any particular private perſon: Nor the Amends and Satisfaction made to any one Man.

Anſw. It muſt be agreed, That Publick Injuries, wherein all, or very many are concern'd, are proper for a Publick Proſecution; as in the name of the King; or by a Preſentment at a Leet, or Quarter Seſſions, *&c.* But if any particular Man receive *a particular damage* by the publick Offence or Injury, he ſhall have his Action; and this is conſiſtent enough with the Proſecution for the Publick. As the *Ca. of* 27 *H.* 8. *fol.* 26, 27. *Br. Abr. Act. Sr. Ca. Plac.* 6. If a Man make a *Ditch* upon the King's *High-way*, this is a wrong to every Man that has a right to paſs that way, and he is preſentable at a Leet for this Offence: *But if I* and my Horſe happen to fall into the Ditch riding along the way, and ſo receive a particular damage, I may have an Action upon the Caſe againſt him that made the Ditch. 9. *Rep.* 113. 5. *Rep.* 72, 73. *It is the ordinary Caſe, A.* makes an Aſſault and Battery upon *B.* this is but one ſingle act, *but it has a double aſpect*; 'tis a breach of the King's Peace, and for that *A.* is Indictable, and may be Fined to the King, and Impriſoned. *It is a particular wrong* to *B.* for which *B.* may have an Action of Aſſault and Battery, and recover Damages; and both of them conſiſtent.

So in our Caſe; this falſe and malicious Double Return, it was an injury to the King and Kingdom, and to the Houſe of Commons, in that while the Election by this means was under diſpute, they wanted the Plaintiff's Service and Aſſiſtance. It was a wrong to the County of *Suffolk*, for the Knight of a Shire has *Plenam poteſtatem pro ſe & communitate comitatus ad faciendum & conſentiendum.* But it was more particularly an injury to the Plaintiff,

In that he was for ſome time depriv'd of the Honour done him by his Countrey, who by their Electing of him, ſettle that Character upon him, That he was *Magis idoneus & diſcretus*; for the Writ commands ſuch to be choſen.

He was hindred from diſcharging his Truſt committed to him by his own Countrey; hindred from doing Service to the King and Kingdom: Hindred of his Wages.

The *Stat. of* 27 *H.* 8. *c.* 26. which unites *England* to *Wales*, Enacts, That for every Shire in *Wales* there ſhall be choſen one Knight to ſerve in Parliament, and one Burgeſs for every Burrough; and that the Knights and Burgeſſes ſhall have like Dignity, Pre-eminence, and Privilege, and ſhall be allowed ſuch Fees as other Knights and Burgeſſes of the Parliament have, and are allowed: *By which it appears*, there are Dignities, Pre-eminencies, Privileges, and Fees, belonging to ſuch as ſerve in Parliament; of all which, the Plaintiff for a time was hindred by this Falſe Return.

And *in that it does concern the Government*, it argues the greater Injury done to the Plaintiff; for every Member of Parliament for the time he ſerves there, is inſtrumental in carrying on the Government: which is an high Honour to him. *Tu regere imperio populos Hæ tibi erunt artes.* 'Tis a Noble Employment.

And *ſince it does ſo nearly* concern the Government, We that are Judges ſhould be the more careful to diſcourage all Abuſes committed by Sheriffs in Elections; it is of vaſt concernment to the Kingdom, that Elections ſhould be fair, and Returns duely made without partiality and indirect means uſed: And we, by our Judgments, ſhould encourage all Remedies againſt ſuch Abuſes and Practiſes.

Beſides all this, the Plaintiff has been put to great Expences, and undergone great Labour and Trouble, which is a private and particular Damage, and therefore entitles him to his particular Action.

A Juſtice of Peace may have an Action of Slander in relation to his Office, yet that was not an Office at Common Law neither; and yet it concerns the Government.

The *Stat.* of 7 *H.*4. *Cap.* 1. Recites, That the Commons made a grievous complaint to the King, of the undue Elections of the Knights of the Counties; *which* (ſays the Preamble) *be ſometimes made by affection of the Sheriffs*, to the great ſlander of the Counties, and hinderance of the buſineſs of the Commonalty of the ſaid Counties.

By which it appears, how great the Miſchief was in thoſe days, and whence it came principally, *viz.* from the partiality of the Sheriffs: And that *Statute*, to prevent the Abuſes, does appoint the Return of Indentures under the Seal of the Sheriff, and the Seals of the Electors: But the Defendant in our Caſe has practis'd *an abuſe even in the very Remedy*, by returning ſeveral Indentures, and ſo evading the good proviſion made by that Statute.

The *Stat. of* 11 *H.* 4. *c.* 1. Obſerves, That *no pain is ſet in ſpecial* by that *Stat.* of 7 *H.* 4. upon Sheriffs, if they make Returns contrary

contrary to that Statute, and gives power to Judges of Aſſize to puniſh them, and to inflict the Penalty of 100 *l.* upon the Sheriff; and the Knights unduely return'd, are to loſe their Wages: And all this depends upon the Enquiry made by the Judges of Aſſize. At this time ſurely this matter of Elections, and the Examining and Determining of the Right, was not held ſo ſacred and ſo incommunicable a thing as ſome would have it now; for by this *Statute* 'tis referr'd to the Judges of Aſſize.

But the Principal Statute in this matter, is that of 23 *H.* 6. *c.* 15. which Sets out the great abuſes by Sheriffs committed in Elections; it recites, That of late divers Sheriffs *for their ſingular avail and lucre*, have not made due Elections of the Knights. One would think by thoſe words (*for their Lucre*) that there was Money ſtirring upon theſe occaſions, even in thoſe times, and that ſome men paid dear to be choſen Parliament-men; Or elſe, how could a Sheriff make profit to himſelf by an Election? And to be a Parliament-man, it ſeems, was a very deſirable thing in thoſe days.

And foraſmuch (ſays that Statute) *as a ſufficient Pain, and convenient Remedy*, for *the party* in ſuch Caſe *grieved*, is not ordained in the ſaid Statutes againſt the Sheriffs: It therefore provides a better Remedy.

But let us to our purpoſe, Obſerve by the way, That it mentions *the Party Grieved*; ſo that *there is a Party grieved*: It is not meerly a publick Offence, but an injury to ſome particular perſon, and to ſome one perſon; for it ſays, the Party grieved, but it does not mention who that Party grieved is: So that it may be objected, that thoſe words (the Party grieved) refers to every Elector, as well as the Knight Elected.

But *the Enacting Clauſe* expounds the words, and declares whom the Makers of that Law meant; *for it makes the firſt offer of the Forfeiture* to every perſon choſen Knight, and not duely Return'd: ſo then 'tis plain, that *Knight Elected, and not Return'd, is the Party grieved.* If he have a particular Wrong done him, then it follows he ought to have a particular Remedy and Satisfaction: And he was a party grieved before theſe Statutes made, and this Penalty and Remedy given; for theſe Statutes do not firſt make him a party grieved, but mention him as being ſo before. *If he were ſo before*, ſurely the Law gave him ſome Remedy, or elſe there was a *Gravamen* without *Remedium*; which would have been a defect in the ſame.

Objection 2. Is that which I think is moſt relied upon, and that has moſt weight laid upon it, *viz. That this Action concerns an*

Election of a Knight to the Parliament, and therefore belongs to the juriſdiction of the Parliament, and ought to be determined there, and not by any Court inferior to it.

Anſw. To this it has been truely Anſwered, That tho in this Caſe we have often occaſion to ſpeak of the Parliament, and to mention an Election to Parliament, yet the Right of Election is not call'd in queſtion, nor was it to be tried in this Action, but was determin'd by the Houſe of Commons; and this Action is purſuant to that deciſion of the Right of Election by the Parliament, and grounds it ſelf upon it.

I ſhall however, take this occaſion in the firſt place to *ſhew in what Matters that concern the Parliament*, the Judges of *Weſtminſter-hall* have in all times, and muſt meddle, and take cogniſance of them. And in *the next place, what they have declin'd* and left to the Parliament.

1. They have Debated and Reſolv'd *what is a good Seſſion of Parliament, and what is not, and what makes a Seſſion*, as in *Tr.* 12. *Jac.* in *B. R. Rolles, Rep.* 29. There were ſeveral Acts of Parliament that had paſt at a former Parliament, which were continued only to the firſt Seſſion of the next Parliament, and in that Caſe they held thoſe Acts then ſtill in force; for tho the Parliament had met, yet no Act paſſing, they therefore adjudg'd it was no Seſſion, and there was a neceſſity that the Judges ſhould determine this: For tho the King and Parliament makes Acts, yet the Courts in *Weſtminſter* put thoſe Acts in Execution; and therefore muſt firſt ſatisfy themſelves.

2. Whether they are in force or not ſo, in the Princes Caſe 8 *Rep. Whether the Charter* made by King *E.* 3. to the Prince, *were an Act of Parliament or not*, is here Argued and Reſolv'd. So 4 *H.* 7. 18. 6 and 7 *H.* 7. 14, 15.

3. In *Rolleys Abr.* 1*ſt. Part. fol.* 93. *Caſ.* 19. under the Title of *Action upon the Caſe*, there is cited 17 *E.* 3. in *B. K. Rot.* 69. where an Action is brought by *John Bokeland* Knight of *Wiltſhire*, againſt the Sheriff of that County, for not levying 10 *l.* 4 *s. pro Expenſis ſuis in attendencia ſua in Parliamento.* Now in order to the Recovery in this Action, many things relating to the Parliament, as when the Parliament began? How long his Attendance was? And divers other Queſtions relating to the Parliament, muſt of neceſſiry be incident.

10 *Eliz. Dier.* fol. 275. The very lower end of that fol. there is *an Action brought againſt the Keeper, for letting a Burgeſs of Parliament to go at large by Writ de Privilegio Parliamenti,* Who was in Execution. The Lord *Dier* ſays nothing there what became of it. But Sir *Francis Moor*, in his *Rep. fol.* 57. at the lower end of that fol. Reports, that it was held by *Dier*, that if one condemn'd in Debt or Treſpaſs, be choſen to the Parliament, and after taken in Execution, that he ſhall not have his Priviledge of Parliament. And, as he ſays, it was ſo held by the Sages of the Law in the *Caſe of Ferrers*, and that tho' his Priviledge was indeed allow'd, yet (as they held) it was *minus juſte*, which *Caſe of Ferrers* was the ſame here mentioned before to be in *Dier fol.* 275. as appears by Mr. *Crompton* in his Juriſdiction of Courts; *fol.* 8. *b.*

So that ſome things relating to the Parliament, the Courts of *Weſtminſter-Hall* muſt determine, and the Judges cannot avoid it, if they will do Juſtice.

2. *But ſome things there are* concerning the Parliament, which the Courts of *Weſtminſter-Hall* may determine if they think fit, or they may at the Diſcretion of the Judges, ſuſpend their further Proceeding, and refer them till the Parliament meets to determine them.

33 *H.* 6. *fol.* 17, 18. It is there Debated by the Judges, whether it were a perfect and *legal Act* that paſt in Parliament, againſt Sir *John Pilkington* for a Rape committed by him, and it depended upon the courſe of the two Houſes, in their Tranſmitting of Bills from one to another, and of Indorſing the Bills; and they ſent for the Clerk of the Parliament, and conſulted with him about it, and there *Forteſcue Chief Juſtice*, held the Act in queſtion to be a good Act of Parliament, but, ſays he, *peradventure the Matter*, or Queſtion, *ſhall wait*, till the next Parliament meet, and then *we* may be *certified by them* of the certainty of the Matter. By this it appears, that *the Judges did not diſown the Juriſdiction* of that Cauſe that was ſo nearly depending upon the uſage of Parliament, but that it belong'd to them and not to the Parliament, yet it was convenient to be adviſed by the Parliament, and to wait till then.

And Sir *Edward Coke*, in his 2. *Inſt.* 408. tells us that Matters of Difficulty were uſually adjourn'd to Parliament.

3. *Some things there are that concern the Parliament*, wherein the Courts of *Weſtminſter-Hall* muſt not intermeddle, but the Juriſdiction belongs to the Parliament only.

By the Statute *of* 4 *H.* 8. *c.* 8. tho' all in that Act, that *concerns one Richard Strode* is a private Act, yet there is one Clauſe is a general Act, and is declaratory of the Antient Law and Cuſtom of Parliament, *viz.*

It is Enacted, that all Suits, Accuſements, Condemnations, Executions, Fines, Amerciaments, Puniſhments, Corrections, Charges and Impoſitions, at any time from thence-forth to be put or had *upon any Member*, for any *Bill, Speaking, Reaſoning, or Declaring of any Matter concerning the Parliament, to be Communed or Treated of,*

be utterly void and of none Effect. This concerns *none but Members* of Parliament, and it provides for Freedome of Debates, *in matters that are proper* to be treated of in Parliament.

The Lords for themſelves only, and for their own Houſe, made claim of this Priviledge and Juriſdiction, 11 *R.* 2. *num.* 7. Sir *Robert Cotton's Abr. fol.* 321. but it is limitted only to *Matters mov'd in Parliament*, and the King allow'd it in full Parliament.

And Sir *Edward C. in his* 2*d. Inſt. fol.* 15. ſays that, *pari ratione*, the like belongs to the Houſe of Commons *: And this is the Reaſon, ſays Sir *E. C.* that Judges ought not to give any Opinion of a Matter of Parliament, becauſe it is not to be decided by the common Laws uſed in other Courts, but *ſecundum legem & conſuetudinem Parliamenti.*

* *Croke*, 5 *Car.* 181. Sir *John Elliot* and *Den. Hollis* plead the like Plea to the Juriſdiction of the King's Bench.

So likewiſe in Caſe of the priviledge of a Member of Parliament, againſt Suits and Executions, ſitting the Parliament, the Judges have refus'd to give their Opinion, tho' demanded by the Lords. As they did in *the Caſe of* Thorp *Speaker of the Houſe of Commons*, who was taken in Execution between two Seſſions of Parliament, of which the Commons made complaint to the Lords, and the Lords ask'd the Advice of the Judges, whether the Speaker ought to be deliver'd by Priviledge of Parliament, *the Judges anſwer'd, that they ought not to determine the Priviledge of the High Court of Parliament:* the Caſe is 31 *H.* 6. *fol.*— *Rolles Abr.* 2*d. part* 94. Caſe 1. See 39 *H.* 6. Sir *Robert Cotton's Abridgment, num.* 6.

Concerning *departure from Parliament*, (Sitting the Parliament) *and not attending* according to their Duty. *The Caſe ſeems doubtful*, whether any other Court than the Parliament can determine of that Offence, it ſeeming to be of a middle Nature. For tho' it be an Offence committed by a Member, and that in Parliament-time, which argues for their Priviledge, and againſt the Juriſdiction of any inferiour Court, *eſpecially while the Parliament Sits*, who undoubtedly may take cognizance of it, and puniſh it: Yet on the other ſide, when the Parliament has not taken cognizance of it, and the Parliament is riſen, why ſhould not that Offence, at the King's Suit, be puniſh'd in the Star-Chamber, while that was a Court, and now in the King's Bench? And why ſhould Priviledge protect againſt Non-attendance, when the true ground of Priviledge is by Reaſon of Attendance. And Mr. *Plowd.* who was a very Learned Lawyer, ſubmits to the Juriſdiction, but *Traverſes* his Departure, as the Caſe of the Biſhop of *Wincheſter*, 3 *E.* 3. remembred by Sir *Edward Coke*, in his 2*d Inſt.* in his *Chapter* of *Parliament*, (as far as he Reports it) ſeems rather to be an Authority againſt the Juriſdiction of any other Court beſides the Parliament it ſelf, in ſuch Caſe of Proceeding againſt a Member to puniſh him for Non-Attendance. For the Biſhop being impleaded by Original Writ at the King's Suit, (which I ſuppoſe was in the King's Bench) *quia receſſit a Parliamento ſine licentia Regis.*

The Biſhop pleaded, *quod ipſe eſt unus de paribus & dicit, quod ſi quis eorum deliquerit in Dominum Regem in aliquo Parliamento, in Parliamento*

liamento debet corrigi & emendari, & non alibi in minori Curia. And ſo Sir *E. C.* ſeems to leave the Victory on the Biſhop's ſide, and that his Plea ſucceeded. But Sir *Francis Moor*, 779, 780. Reports the Caſe *of the Lord Sturton*, and the *Lord Mordant*, how they were deeply Fined in the Star-Chamber, 4 *Jac.* for abſenting from Parliament, at the Complaint of the Attorney General, *ore tenus.* And there were then preſent in the Star-Chamber, the Lord Chancellor, Chief Juſtice *Popham*, *Fleming* and *Walmſley*. And for Preſidents to juſtifie the Proceeding againſt them in that Court, *they cite the Caſe of the Earl of Cornwal*, 4 *H.* 3. *And the Biſhop of* Wincheſter's *Caſe*, (which I mention'd but now) 3 *E.* 3. how that for departing from Parliament, without Licenſe, their Lands were ſeized.

But the Objection in our Caſe is, *concerning a matter of Election of a Knight of a Shire* to ſerve in Parliament: that no other Court but the Parliament muſt meddle in it, as the Objectors would have it.

Anſwer. It is not impertinent therefore, to enquire briefly of the true Juriſdiction in this Matter.

Sir *Robert Cotton* affirms, that Writs of Summons for Knights of the Shire, to ſerve in Parliament, began 49 *H.* 3. and that the admittance of Commoners into the Parliament, was purpoſely to leſſen and curb the power of the Lords, after the daring Earl of *Leiceſter* was ſlain in the Battle of *Eveſham*, (which was that very year) and the Barons were totally routed by Prince *Edward*, (afterward King *E.* 1.) and King *H.* 3. was reſcued out of their Hands. And to back that Opinion, it is obſerv'd, *that the firſt Writ to the Sheriffs*, to Summon two Knights out of every Shire, that is to be found upon Record, is that of the Cloſe Roll 49 *H.* 3. (the very ſame year) *dorſo* 10 and 11. Thus Mr. *Pryn* affirms in his Preface to the Abridgment of the Records of the Tower, *fol.* 11. in the beginning of that *fol.* and *fol.* 13. *b.* in the middle of that *fol.*

But we muſt not be Govern'd by Hiſtorians in Matters of Law, and therefore notwithſtanding this obſervation of Sir *Robert Cotton*'s and Mr. *Pryn's*, we muſt preſume that the Houſe of Commons and Elections of Knights of the Shire, are as Antient as the Common Law, and have been time immemorial, becauſe we finde no Written Law that does firſt begin any ſuch inſtitution.

But to come cloſer to the Objection: and to enquire, who are the proper Judges of the Right of Elections.

Mr. *Pryn* in the ſame Preface, *fol.* 14. *b.* in the middle of it, (as I my ſelf have folio'd it, for the print has no folio's to the Preface.)

The King and Lords (ſays he) were *antiently* ſole Judges of the Legality of Elections of Members of the Houſe of Commons till the time of King *Henry* 7.

And in Sir *Robert Cotton*'s Abridgment, *fol.* 392. in the year 1 *H.* 4. *num.* 80. *at the Prayer of the Commons*, the King declares, that the Commons were only Petitioners, and that all Judgments appertain

appertain to the King and Lords, unleſs it were in Statutes, Grants, Subſidies, or ſuch like, the which Order the King would from that time to be obſerv'd.

But we know that the Houſe of Commons is now poſſeſs'd of the Juriſdiction of determining all Queſtions concerning the Election of their own Members, ſo far at leaſt as is in order to their being admitted or excluded from ſitting there. But how far their Judgment is concluding to all others to other purpoſes, I have now no juſt Occaſion to examine, for as has been obſerv'd, *the Plaintiff in this caſe grounds his Action upon his* Original Right of Election, and mentions the determination of the Houſe on his ſide, and not only alledges that he was duely Elected, but ſo return'd by the Defendant himſelf, and that tho' he were for ſome time hindred from ſitting by occaſion of the falſe Return, made by the Defendant on purpoſe, and the Election was under queſtion by it, yet he prov'd it clearly to the Houſe, and was admitted, and his Election declar'd good, and taking it for granted that he was duly Elected, he Sues in the King's Bench, by this Action to recover Damages for the Injury done him by the Defendant, for which the Houſe of Commons could not have help'd him. For to that purpoſe they have no Juriſdiction, for they cannot examine a Witneſs upon Oath, nor can they act the part of a Jury to give Damages, nor have they any power to award a Tryal, or to cauſe the Sheriff to impannel a Jury.

Object. 3. This is *an Action of a new Invention,* and *primæ impreſſionis,* and never any ſuch was brought before, ſave that of *Nevil* againſt *Stroud*; which never had any determination.

Anſw. 'Tis true, 'tis new, in the particular circumſtances, but not in the main, nor in the ſubſtance; *'tis new in that 'tis brought* by one Elected Knight of a Shire againſt the Sheriff *for a falſe and malicious return of another* Indenture, whereby the Plaintiff was put to great Expence and Trouble, *but 'tis not new in the general nature of the Action.* For nothing is more frequent than Actions upon the Caſe where an Injury is done and damage ſuſtain'd, nay 'tis very frequent for Actions upon the Caſe to be brought againſt Sheriffs for meer falſe Returns, and that where there is no Malice, nor any of thoſe great aggravations that appear in this Caſe.

For this I refer you to the Caſe in *Rolls's Abr.* 1. *part. fol.* 99. *Getin, Palmer* and *Marſhal* in the King's Bench, where the Bailiff of a Franchiſe was newly remov'd, but tho' he were remov'd, took upon him to anſwer, but made a falſe anſwer to the Sheriff's Warrant, to execute a *Fieri Fac.* againſt an Adminiſtrator, and the Sheriff made that return to the Court, and thereupon an Action upon the Caſe brought againſt the Sheriff, and adjudg'd it lies, and that the *Sheriff at his Peril muſt take notice who is the rightful Bailiff* of the Franchiſe, and accept of no Anſwer to his Warrant from any other.

19 *H.* 6. 29. An Action upon the Caſe againſt a Deputy Sheriff, for *imbezeling a Writ.*

19 *H.* 6. 38. *by Paſton.* If a Sheriff upon a *venire fac' return a*

Jury

Jury that is inſufficient to pay iſſues, the next Sheriff to whom the Iſſues are eſtreated to be levied, muſt charge himſelf with the Iſſues, and muſt not return a *Nihil*, but ſhall have an Action upon the Caſe, againſt his Predeceſſor, for his falſe return: yet here is no maliee, but at the moſt a neglect, or a miſtake only.

39 *E.* 3. 7. *Brook.* Action upon the Caſe 67.

An Action upon the Caſe againſt a Sheriff, for *not ſummoning and warning* a man in due time upon a Writ of Præmunire or Attachement, whereby he ſuſtain'd Damage, as Judgment given againſt him, or the like. This is but a *bare neglect or omiſſion*, and ſeems to be the leaſt or loweſt ſort of injuries, and yet being accompanied with a particular Damage to the party, tho' without any malice on the Sheriff's part, the Action will lye.

3 *E.* 4. 20. *Brook.* Action upon the Caſe *pl.* 91. by *Danby* and *Pigot, for a falſe return only.*

If a *Nihil* be return'd againſt me who have Land, *F. N. B.* 93. 31 *E* 3. *Fitz. Abr. Proces* 55.

So *for not returning a Writ* of ſecond Deliverance, which is a meer neglect and *non-feſance*, tho' there be no Malice, 21 *E.* 3. 43. *Br. Act. ſ. ca. pl.* 48. 5 *Rep.* 32. *b.* 91. 7. *Rep.* 1.

So againſt a Biſhop if he falſly return, that *an Executor has not refus'd* the Executorſhip, when *re-vera* he has refus'd it, 2*d Leon.* 221.

So againſt an Eſcheator. 9 *H.* 6. 60. 21 *E.* 4. 23. 27.

Much more ſhall the Action upon the Caſe lye againſt the Sheriff as the circumſtances of this Caſe are, where the return is not only falſe, but he knew it to be falſe, and he did it maliciouſly, with a purpoſe to hinder the Plaintiff from Sitting, and to put him to Expenſe, and where the Plaintiff has had ſo great a Damage. And the Sheriff *by his Oath* is oblig'd *to do right* as well to poor as to rich, in all that belongeth to his Office. 2. To do no wrong to any man for *Favour* nor *Hate*. 3. To diſturb no Man's Right. 4. Truly to return, and truly to ſerve all the King's Writs, as far forth as ſhall be within his cunning. And the Jury by their Verdict in this Caſe, have found the Defendant to fail in every one of theſe Clauſes of his Oath. And tho' the Circumſtances that do diverſify all Caſes are new in this caſe, yet 'tis very frequent in Actions upon the Caſe, to have new Caſes and new Circumſtances, and there is nothing more frequent than this Variety and Novelty.

Sir *Francis Bacon* in his Book of Advancement of Learning, Speaking of *Caſes omitted in Law*, *fol.* 38. ſays, that *the narrow compaſs* of

Man's Wiſdome, cannot comprehend all Caſes which time hath found out, and therefore Caſes omitted and *new* do often *preſent themſelves*, but every new Caſe does not require a new Law, for then the Legiſlative Power muſt be continually exercis'd, but though it differs from former Caſes in circumſtances, yet it may fall under a general Rule, or be proceeded upon by parity of Reaſon, *ubi eſt eadem ratio ibi idem eſt jus.*

And the Statute of *W.* 21. *cap.* 24. Has made ample Proviſion for all ſuch new Caſes that fall under a general Rule, but have no form'd Writ, or Writ of courſe that fits it in all the particulars and circumſtances. *In conſimili caſu ſimili remedio indigente, fiat breve,* ſays that Statute.

In the *8th Rep. fol.* 48. *Jehu Webb's* Caſe, there you have the diſtinction of Writs, ſome are *brevia formata ſeu de curſu,* and from thence have the Curſitors their name, becauſe they have the drawing of thoſe Writs.

Some are *Brevia Magiſtralia quæ nec ſunt de curſu nec formata,* i. e. *de aliqua certa forma ſed ſæpius variant ſecundum varietatem caſuum factorum & querelarum,* (as are Actions upon the caſe) *&c.* which have not any certain Form, but are upon occaſion drawn by the Maſters of the Chancery, and from thence are call'd *Magiſtralia,* all this is by Vertue of the Words of the Statute of *W.* 2. *c.* 24. *Concordant Clerici in Cancellaria de brevi faciendo.* 2. *Inſt.* 405, 406, 407.

And many new Caſes may be put, that have no parallel caſes to be found in our Books, if all the particulars and circumſtances be regarded, as the Caſe 8 *Car. Croke* 291. in the King's Bench, where an Action upon the caſe is brought againſt *an Apparator,* for what he did in his Office, *viz.* for falſely and maliciouſly preſenting one, and that in *the Spiritual Court,* for incontinency. This was againſt an Officer for what he did in his Office, and to which his Oath oblig'd him, and this was for a thing done in the Spiritual Court, *viz.* the Conſiſtory Court at *Exeter,* and for a matter meerly of *Eccleſ. conuſance, viz.* Incontinency, wherein the common Law had nothing to do, *and this caſe had no parallel* nor preſident before it, *and yet being an injury and damage* to the party preſented, *and done falſely and maliciouſly,* and without colour, and for which the party injur'd, could have no recompence in any other Court, but at common Law it *was adjudg'd the Action lay.* This Caſe tho' it had no parallel before it in all the circumſtances, yet in many reſpects it is a parallel to the caſe before us. There is the like Action *againſt Conſtables* for making a falſe preſentment, *Croke Car.* 467. and the Caſe I cited *before againſt a Sumner.* 12. *Rep.* 128.

And for that objection and obſervation concerning the Novelty of this Action, this more may be ſaid in anſwer to it, that till of late years Sheriffs have given no occaſion for the like Action as this,

for

for double Returns, upon Elections to Parliament, have not been in antient times.

Mr. *Pryn* in his *Brevia Parliamentaria Rediviva, fol.* 137. obſerves, that there were not above two or three caſes of Elections queſtion'd from 49 *H.* 3. till 22 *E.* 4. For ought appears by the Returns, or Parliament Rolls, *and not ſo much as one double Return or Indenture.*

And the common Law does comply with and conform to the general Opinion and Genius of the Kingdome, and values what they generally eſteem and value, and diſeſteems what they value not.

Heretofore an Election to ſerve in Parliament, was not a thing ſo deſireable and ſo much ſought after as now a days it is, and it is not the deſire or ſeeking after it, that is to be diſlik'd and condemn'd, for he that deſireth the Office of a Biſhop (*ſays the Apoſtle*) deſires a good Office, but it is the undue means uſed, or the ill ends for which it is deſir'd, that makes the ſeeking bad.

Mr. *Pryn ut Supra, fol.* 165. *anno* 1 *E.* 3. a Writ iſſued to elect two Knights for the County of *Northumberland*, and the Sheriff return'd this anſwer, *communitas comit. Northumbriæ, ſic reſpondet quod ipſi per inimicos Scotiæ adeo ſunt deſtructi quod non habent unde ſolvere expenſa duobus militibus proficiſſuris ad conſilium apud Lincoln. tenendum.*

In his his fourth part of his Regiſter of Parliamentary Writs, is mention of a Patent of Exemption granted 42 *E.* 1. to the Town of *Torriton* in *Devonſhire*, which Patent recites in its preamble, that the Men of that Town *never uſed to ſend Burgeſſes to Parliament*, till the Sheriff 21 *E.* 1. *ſummonitos fuiſſe malitioſe returnavit.*

So that a malicious Return to Parliament, is no new thing, but has been formerly done, and as the Plaintiff in this Action has well ſued the Sheriff for returning another with him. So I make no doubt but as the caſe then ſtood with the general Humour and Opinion of the People, thoſe of *Torriton* might have had their Remedy againſt the then Sheriff, for returning them Summon'd.

And the Law is ſtill the ſame, in that it ſtill ſets a price and eſteem upon that which the people generally eſteem and value.

And ſeveral caſes have been put to prove, that new Statutes have given occaſion to new Actions upon the caſe, which Actions could not have been Sued at the Common Law; and yet thoſe new Laws and Statutes, do not give thoſe new Actions, but only occaſion'd them.

Barnes verſ. Carey 12 *Jac.* King's Bench, *Roll's Rep. fol.* 47.

The Plaintiff there brought an Action upon the caſe againſt the Sheriff of *Briſtol*, for ſuffering *J. S.* to eſcape out of his Cuſtody.

J. S.

J S being committed by the Commiſſioners of *Bankrupts*, for refuſing to anſwer *Interr.* the Plaintiff being one of the Creditors, and *J.S.* a Bankrupt, and after many Exceptions taken to the Declaration, the Court gave Judgment for the Plaintiff. And yet there was no ſuch thing as Commiſſion of Bankrupt at the common Law, but the common Law takes occaſion by the Statutes of *Bankrupt*, to give ſuch an Action upon the Caſe, which before thoſe Statutes could not have been ſued.

In like manner the common Law takes occaſion by thoſe Statutes that give the Action of *waſte* againſt Tenant for life, or years, againſt whom it lay not by common Law, to give an Action upon the caſe againſt ſuch Tenants, if they will not permit their Leſſors to enter upon the thing demiz'd, to view whether *waſte* be done or not. *Croke 2d part* 478.

Object. 4. That there is *not one caſe in Law parallel* to this caſe for a Sheriff to be ſued for returning the whole Truth and ſomething more than the Truth: Tho' Actions for falſe Returns are frequent.

Anſw. This is an Action for a falſe Return, and ſomething more. That it is for a falſe Return, appears by that Allegation that he did falſely make his Return, and the Jury have found it ſo, and we muſt believe it. And it was falſe in this, in that he return'd an Indenture pretended to be under the Hands and Seals of divers Perſons, as the greater part of the ſaid County, purporting the Choice of another than the Plaintiff to be Knight of the Shire. The Plaintiff does not alledge that there ever was any ſuch Indenture Seal'd by any perſon, but that the Defendant did falſly return another Indenture, purporting the ſame to be made by divers perſons, *&c.* So that we may reaſonably underſtand it, that in truth there never was any ſuch Indenture Seal'd by any but the Sheriff himſelf, and not by any others that were preſent at the Election. *2ly.* Tho' the Sheriff have return'd the whole Truth, yet together with that Truth he return'd a falſehood, that till it was re-examin'd, it could not appear which was the Truth, and in the mean time the Plaintiff ſuſtain'd all his Damage.

Object. 5. That the Sheriff acted herein as a Judge, and therfore if he err, he is not to be Sued for it, but his Errour may be reform'd, and the Law will not ſuffer an averrment tending to the diſcredit of a Judge. *Pl. comment.* 491. *b.* and *Dier.* 89. *b.*

Anſw. All this is true, as to one that is a Judge of Record, in reſpect of the Greatneſs of his Authority, and the great Truſt the King and the Law repoſes in a Judge of Record. *But the Sheriff is no Judge at all in what he Acts in the Election of Knights for the Shire*; but is only *an Officer upon Record*, 9 *H.* 6. 53. and 60. *Br. Ab. Tit. Act. ſ. ca. plac.*

plac. 6. tho' in ſome particular caſes indeed, the Sheriff is a Judge, as in a *Juſticies*, 6 *Rep.* 12. *ad fin.* and a Judge of Record, as in a *Rediſſeiſin* by the Statute of *Merton C.* 13.

Object. 6. The Statute of 23 *H.* 6. *c.* 15. has provided a Remedy againſt the Sheriff, for any abuſe committed by him in Elections, *viz.* the penalty of a hundred pound, in caſe of Knights of the Shire, to the Knight injur'd; and it does recite in the Preamble, that a convenient Remedy for the party grieved, is not ordain'd in the former Statutes, and from hence it is inferr'd, that there was no remedy for the party griev'd at the Common Law, nor before this Statute.

Anſw. I have already prov'd, that there was a remedy at the Common Law, and before this Statute; and this Statute is an Argument to prove it, for this Statute mentions a party griev'd, and there could be no Grief without a Remedy, otherwiſe the Law would have been defective. And it cannot be deny'd, but that if there were a Remedy at the common-Law, this Statute being in the affirmative, does not take it away, only it gives another Remedy.

And for the words of this Statute of 23 *H.* 6. that *a convenient remedy* for the party griev'd is not ordain'd by the former Statutes. This does not argue that there was no Remedy at the common Law, nor does it argue that there was no Remedy at all, but that there was no *convenient* Remedy by thoſe former Statutes, and thereupon the Statute of 23 *H.* 6. gives an hundred pound to the Knight injur'd by an undue return.

I ſhall put ſome like caſes, where Acts of Parliament give Remedies, where yet there were other Remedies before at common Law, and the party may ſue for either, *Roll's Abr.* 1. *part. fol.* 93. *caſe* 20.

A Diſtringas is awarded to the Sheriff to diſtrain the Defendant in an Action, and the Sheriff returns too ſmall Iſſues, tho' an Averment lyes by the Statute of *W.* 2. *c.* 43. yet the Plaintiff may well have his Action upon the Caſe againſt the Sheriff, becauſe it appears by the words of the Statute, that it is a falſe Return. Obſerve the Argument there uſed, *viz.*

If the Action upon the caſe did not lye, in ſuch caſe *the Plaintiff had not any remedy at the common Law, which was greatly miſchievous*, and the Statute (as is there obſerv'd) tho' it give a new Remedy, and takes no notice of any Remedy that was before in the caſe, yet it does not reſtrain the Plaintiff from any remedy that he had at the common Law. 'Tis there indeed made a *quære*, but Serjeant *Rolls* has this Note upon it, that *Tr.* 3. *Car.* one Mrs *Bennet*, upon good advice, brought

ſuch an Action upon the caſe againſt the Sheriff of *London*, for returning too ſmall Iſſues againſt the Mayor and Commonalty of *London*.

The Statute of *W.* 2. *c.* 24. (Sir *E. C.* 2. *Inſt. fol* 404, 405.) firſt gives an Aſſize of *Nuſance* againſt the Alienee of him that levied that *Nuſance*, and *that Statute ſeems* (as Sir *E. C.* obſerves) *to underſtand that the party griev'd was without any remedy before*, for it provides in theſe words, *de cætero non recedant querentes a curia Regis ſine remedio*, yet Sir *E. C.* takes notice, *fol.* 405. of his 2*d Inſt.* at the lower end of that *fol.* upon the words (*a curia*) *that the makers of that Act knew well that the party injur'd by the Nuſance*, might enter upon the ground of the wrong-doer, not only when it was in his hands, but after it was aliened too, and abate the Nuſance, and ſo prevent himſelf of the Remedy by Aſſize of *Nuſance* given by this Act. And beſides this, he had another Remedy by Action, *viz.* If he had any particular Dammage (ſays Sir *E. C.*) *he might bring his Action* upon the Caſe, and recover Dammage, *ne querentes recederent a curia ſine remedio.*

Object. The ground of this Action againſt the Sheriff, is for making a double Return. Now the Declaration ſets forth only one perfect Return, and that is of the Plaintiff's Election, which the Declaration ſays, was *ſecundam exigentiam brevis*, and it was by Indenture under the Seal of the Sheriff and Electors, and though the Plaintiff alledges that the late Sheriff and the Electors return'd another Indenture of the Election of another Perſon, (which is the *gravamen* that he complains of) yet that appears to be no Return, *for it was not ſaid that that Indenture was under any Seals.* And the Statutes of 7 *H.* 4. *c.* 15. and 8 *H.* 6. *c.* 7. require Indentures Enſealed by the Electors to be tack'd to the Writ, which Indentures ſo Sealed and Tacked, ſhall be holden for the Sheriff's Return.

Anſw. This other Indenture laſt mentioned, *muſt be underſtood an Indenture Enſealed*; in like manner as the former, *for the Declaration juſt before mentions the firſt Indenture*, whereby the Plaintiff was return'd to be choſen, *and that is ſaid to be ſo Enſealed*, as the Statutes require, and *then the Declararion* ſays that the Sheriff together with that Indenture return'd another Indenture: ſo that it muſt be reaſonably underſtood, *to be an Indenture in like manner enſealed.*

And then 'tis ſaid by the Declaration, of this laſt Indenture, *that it was annex'd to the Writ*; and ſo return'd by the Defendant the Sheriff, which muſt therefore be preſum'd to be an Indenture Enſealed, *or elſe to what purpoſe did the Defendant* annex it to the Writ, and return it?

3 And

And further the Declaration ſays, *that by reaſon of the falſe* Return, the Plaintiff could not be admitted into the lower houſe, till he had made proof of his Election. Now if that other Indenture were not enſealed, it could not be ſaid to be a falſe Return, for it would indeed have been no Return, and it could not have hindred the Plaintiff from being admitted, nor put him to the Proof of his Election.

And that the Indenture muſt be underſtood an Indenture Enſeal'd by thoſe that were preſent at the Election, *appears by the Writ*, the Form whereof you will find *in Crompt. Juriſdiction of Courts, fol.* 1. *b.* the Clauſe is this, *Et nomina eorundem militum, ſic electorum in quibuſdam Indenturis inter te & illos qui hujuſmodi Electioni interfuerint inde conficiendis, inſeri.* And in another Clauſe, *Et electionem illam ſub ſigillo tuo & ſigillis eorum qui electioni illi interfuerint nobis in cancellariam certifices, remittens nobis alteram partem Indenturar. predictar. preſentibus conſutam una cum hoc breve.*

FINIS.

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2. A4141 Atkyns, R. The power, jurisdiction and priviledge of parliament...1689.
3. A4140 Atkyns, R. The Lord Russel's innocency further defended...1689.
4. A4136 Atkyns, R. A defence of the late Lord Russel's innocency...1689.